

MEMORANDUM TO: David M. Spooner  
Assistant Secretary  
for Import Administration

FROM: Stephen J. Claeys  
Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Investigation of Certain Orange Juice from Brazil

### Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of certain orange juice from Brazil. As a result, we have made changes to the margin calculations for the two participating respondents in this case, Fischer S/A – Agroindustria (Fischer) and Sucocitrico Cutrale Ltda. (Cutrale). In addition, we are continuing to base the final margin for the remaining respondent, Montecitrus Trading S.A. (Montecitrus), on adverse facts available (AFA) because it withdrew from this investigation before the date of the preliminary determination. We recommend that you approve the positions we have developed in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this investigation on which we received comments from parties.

### General Issues

1. Legal Authority to Initiate This Proceeding
2. Scope “Clarification”
3. Successor-in-Interest Determination for Coinbra-Frutesp S.A. (Coinbra-Frutesp)
4. Critical Circumstances
5. Refunds of U.S. Customs Duties
6. Data Changes Arising from the Sales Verifications
7. Treatment of By-Products

### Company-Specific Issues

8. Trading Gains and Losses on Cutrale’s Futures Contracts
9. Offset to Indirect Selling Expenses for Futures Trading Gains and Losses for Cutrale

10. Constructed Export Price (CEP) Offset for Cutrale
11. International Freight Expenses for Cutrale
12. Fischer's Unreported U.S. Sales to Puerto Rico
13. Packing Services Provided by an Affiliate of Fischer
14. U.S. Duty Reimbursements for Fischer
15. Bunker Fuel Adjustments for Fischer
16. Home Market Credit Expenses for Fischer
17. Indirect Selling Expense Ratio for Fischer
18. AFA for Montecitrus
19. Clerical Errors in the Preliminary Determination for Cutrale
20. Growing Season for Cutrale
21. Data Changes Arising from the Cutrale Cost Verification
22. By-Product Adjustment Associated with Cutrale's Non-Orange Fruit Inputs
23. Non-Product Specific Costs for Fischer
24. General and Administrative (G&A) Expenses for Fischer
25. Brix Level for Fischer's Dairy Pak Orange Juice
26. Harvesting Costs for Fischer
27. Undervalued Orange Cost for Fischer
28. Finished Goods "Purchased" from One of Fischer's Affiliates

### Background

On August 24, 2005, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of certain orange juice from Brazil. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Critical Circumstances Determination: Certain Orange Juice from Brazil, 70 FR 49557 (Aug. 24, 2005) (Preliminary Determination). The product covered by this investigation is certain orange juice for transport and/or further manufacturing, produced in two different forms: 1) frozen concentrated orange juice for manufacture (FCOJM) and 2) pasteurized single-strength orange juice which has not been concentrated, referred to as Not-From-Concentrate (NFC). The scope with respect to NFC covers all exports from Brazil; however, the scope with respect to FCOJM covers only the following exporters/producers: Cargill, Cutrale, Fischer, Coinbra-Frutesp and Montecitrus. The petitioners (*i.e.*, Florida Citrus Mutual, A. Duda & Sons, Inc. (dba Citrus Belle), Citrus World, Inc., and Southern Gardens Processing Corporation (dba Southern Gardens)) requested a hearing, which was held at the Department on November 21, 2005. The period of investigation (POI) is October 1, 2003, through September 30, 2004.

We invited parties to comment on the preliminary determination. We received comments from the petitioners, the two participating respondents (*i.e.*, Cutrale and Fischer) and two additional interested parties (*i.e.*, Louis Dreyfus and Citrovita Agro Industrial Ltda. (Citrovita)). Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination. We have

also made a finding that Coinbra-Frutesp is the successor-in-interest to Frutropic ((Coinbra)), and thus its exports of FCOJM are covered by the scope of this proceeding.

### Margin Calculations

We calculated CEP and normal value (NV) using the same methodology stated in the preliminary determination, except as follows:

- We offset the respondents' reported U.S. customs duties by the amount of U.S. duty drawback received during the POI See Comment 5.
- We revised our margin calculations for Cutrale and Fischer to take into account our findings from the sales verifications. See Comment 6.
- We based the margin for certain unreported U.S. sales discovered at the verification of Fischer's U.S. affiliate, Citrusuco North America (CNA), on AFA. See Comment 6.
- We adjusted Fischer's by-product offset to reflect arm's-length sale prices. See Comment 7.
- We offset Cutrale's U.S. indirect selling expenses for its U.S. affiliate, Citrus Products Inc. (CPI), by the amount of gains and losses on futures transactions, up to the amount of the indirect selling expenses. See Comment 9.
- We relied on the per-unit international freight amounts reported in Cutrale's August 17, 2005, response, adjusted for our findings at verification. See Comment 11.
- We accepted the reported packing costs for certain of Fischer's sales of "Dairy Pak" orange juice (Dairy Pak) as facts available. See Comment 13.
- We offset Fischer's U.S. duty expenses by the amount of the duty reimbursements it received from a U.S. customer, where applicable. See Comment 14.
- We offset U.S. freight expenses by the amount of Fischer's reported bunker fuel adjustments. See Comment 15.
- We applied the revised indirect selling expense ratio obtained at verification of Fischer's affiliated reseller to U.S. sales. See Comment 17.
- We performed the 20-percent difference in merchandise (DIFMER) test for Cutrale using per-pound-solid, rather than per-MT, amounts. In addition, we corrected certain clerical errors in the calculation of Cutrale's ICMS taxes and Brazilian warehousing expenses. See Comment 19.

- We recoded Fischer’s control numbers and type codes for all sales of Dairy Pak and NFC in the home market and U.S. sales listings, as well as the cost of production database, to assign Dairy Pak a control number and type code of “2” and NFC a control number and type code of “3.” See the January 6, 2006, memorandum from Elizabeth Eastwood to the file entitled, “Calculations Performed for Fischer S/A – Agroindustria (Fischer) for the Final Determination in the Investigation of Certain Orange Juice from Brazil” (Fischer Final Calculation Memo).
- For both Cutrale and Fischer, we used the cost databases submitted after the date of the preliminary determination, on August 26, 2005, and September 7, 2005,<sup>1</sup> respectively, as the starting point for the respondents’ cost of production (COP) and constructed value and adjusted these amounts as stated below.
- We revised Cutrale’s costs for self-produced orange inputs by multiplying the per-unit cost of growing oranges in the 2003-2004 growing season by the quantity of self-produced oranges used in production during the POI. In addition, we increased the cost of Cutrale’s self-produced oranges based on our findings at verification. See Comment 20.
- We increased Cutrale’s reported costs to include certain internal freight costs which we discovered at verification had been inadvertently omitted. See Comment 21.
- We excluded non-orange crop by-product revenue and costs from Cutrale’s reported costs. See Comment 22.
- We adjusted the G&A expense ratio for Fischer to include contingency losses. Further, we adjusted the G&A expense ratio for an affiliate of Fischer’s to exclude packing and storing expenses from the denominator of the calculation. Finally, we eliminated Fischer’s reported G&A expenses from its per-unit COP of self-produced oranges to avoid double-counting. See Comment 24.
- We revised Fischer’s material costs to include the harvesting costs for self-produced oranges. See Comment 26.
- We adjusted Fischer’s reported costs to reflect the unaffiliated purchase price for those oranges purchased from unaffiliated parties and transferred to either: 1) Fischer’s affiliated orange juice producer or 2) Fischer itself. In addition, we adjusted Fischer’s costs for a portion of its self-produced oranges to reflect the average growing season cost, rather than the transfer price. See Comment 27.

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<sup>1</sup> In addition, we relied on the cost database for Fischer’s collapsed affiliated juice producer, which was submitted on August 29, 2005.

## Discussion of the Issues

### I. General Issues

#### Comment 1: Legal Authority to Initiate This Proceeding

At the time that this case was initiated, there was an existing antidumping duty order on FCOJ from Brazil. See Antidumping Duty Order; Frozen Concentrated Orange Juice from Brazil, 52 FR 16426 (May 5, 1987). This order covered, *inter alia*, Citrovida, Branco Peres Citrus S.A. (Branco Peres) and all other companies that shipped the subject merchandise but did not have an individual rate. Therefore, in accordance with the stated scope in the petition, the scope with regard to FCOJM covers only FCOJM produced and/or exported by those companies that were excluded or revoked from the existing antidumping duty order on FCOJ from Brazil as of December 27, 2004.

Fischer contends that the initiation of this proceeding was unlawful because the scope is company-specific, rather than country-wide. According to Fischer, the petitioners not only circumvented the statute by selectively targeting specific companies, but also used the Department to assist them in this illegal action by refusing to amend the petition to include all exporters of FCOJM after the existing order was revoked. Fischer implies that, as a result, the Department should rescind the initiation with respect to FCOJM.

The petitioners disagree that the decision to initiate this investigation was unlawful. The petitioners note that Fisher failed to support its argument by citing any law, regulation, or precedent that would call the initiation decision into question. Thus, the petitioners maintain that the initiation was proper.

#### Department's Position:

We disagree with Fischer that the initiation of this proceeding was unlawful. Section 731 of the Tariff Act of 1930, as amended (the Act), requires the Department to impose an antidumping duty where an imported product is being sold at less than fair value and that product is causing injury to a domestic industry. With regard to initiating an investigation of a product identified on a company-specific basis, an interested party may file a petition alleging the elements necessary for imposition of an antidumping duty, in accordance with section 732(b) of the Act. The language of this provision is silent as to whether such an inquiry is precluded because some of the merchandise in question is identified on a company-specific basis. A plain language reading of this provision suggests if a domestic industry brings sufficient information of injurious dumping, the Department is obligated to conduct such an inquiry. Also, it must be noted that neither the Statement of Administrative Action (SAA) nor the legislative history provides guidance on this issue. Under the Department's regulations and the SAA, we will conduct an investigation where we receive sufficient information; the only basis for rejecting a petition is where the petition fails to set forth the elements necessary to establish dumping and injury with respect to the subject merchandise. While there are several bases for rejecting a petition and

declining to initiate an investigation (e.g., inadequate industry support, lack of standing), nothing in the statute prevents the Department from initiating an investigation with a company-specific component.

Further, contrary to Fischer's assertions, there is past precedent for initiating an investigation in which the scope is company-specific. In the case of Initiation of Antidumping Duty Investigation; Pads for Woodwind Instrument Keys from Italy Manufactured by Luciano Pisoni Accessori Strumenti Musicali A Fiato, 57 FR 54220 (Nov. 17, 1992) (Woodwind Pads from Italy), the petitioner brought a company-specific petition to recapture a manufacturer excluded from the original investigation as a result of litigation.<sup>2</sup> In Nylon Impression Fabric From Japan: Initiation of Antidumping Duty Investigation, 50 FR 28111 (July 1, 1985), the petitioner filed a company-specific petition against two companies that received *de minimis* margins in the original investigation and were thereby excluded from the order.<sup>3</sup> Further, in Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, 52 FR 30700 (Aug. 17, 1987) (TRBs from Japan), a portion of the scope identified the subject merchandise on a company-specific basis.<sup>4</sup> The Department conditioned NTN Bearing Corporation's (NTN's) inclusion in the scope of that investigation upon its remaining revoked from a pre-existing order on tapered roller bearings from Japan. The petitioners in TRBs from Japan initiated the investigation subsequent to NTN's revocation from the pre-existing order on tapered roller bearings. The petitioners requested the unusual scope out of concern that NTN and its U.S. affiliate would import the tapered roller bearing parts and reassemble and sell the finished tapered roller bearing in the United States, thereby

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<sup>2</sup> See Final Determination; Antidumping Duty Investigation of Pads for Woodwind Instrument Keys from Italy Manufactured by Music Center s.n.c.di Luciano Pisoni and Lucien s.n.c. di Danilo Pisoni & C., 58 FR 42295 (Aug. 9, 1993). This proceeding was unusual because, unlike the case in country-wide investigations, we did not calculate an "All Others" rate because the investigation was limited to only one company and there was an existing order covering the subject merchandise. Id.

<sup>3</sup> We note that this investigation resulted in a negative final determination. See Antidumping; Nylon Impression Fabric From Japan; Final Determination of Sales at Not Less Than Fair Value, 51 FR 15816 (Apr. 28, 1986).

<sup>4</sup> See TRBs from Japan (the investigation covered both tapered roller bearings and components not previously covered by an existing proceeding, and tapered roller bearings and components covered by an existing proceeding but produced and/or exported by an excluded exporter and imported by its U.S. affiliate for reassembly to finished tapered roller bearings). The scope was upheld on appeal. See NTN Bearing Corp. of America v. United States, 14 CIT 623, 628 (1990) (NTN Bearing Corp.) (the Court affirmed the Department's determination to maintain scope language that identified the merchandise of a specific manufacturer and its U.S. affiliate in order to avoid possible circumvention of the order).

circumventing the order on tapered roller bearings. Thus, the petitioners in TRBs from Japan fashioned the scope to prevent circumvention of the antidumping duty order.<sup>5</sup>

In the instant case, the petitioners explained that the company-specific element of their petition was a direct result of the then-existent order on FCOJ from Brazil failing to provide effective relief against dumped Brazilian imports of FCOJ because several of the companies they viewed as dumping FCOJ were no longer covered by the order. For that reason, the petitioners brought a new petition to the Department covering FCOJM and NFC. Where the Department has faced the possibility of administering two proceedings covering identical merchandise, we have chosen to craft the scope of the subsequent proceedings to eliminate the potential overlap.<sup>6</sup> Our rationale behind this policy is a recognition of the difficulties associated with administering proceedings with overlapping scopes.<sup>7</sup> Thus, we carefully crafted the scope of the instant investigation to avoid overlap with the then-existing order on FCOJ from Brazil. Consequently, we find that our

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<sup>5</sup> See NTN Bearing Corp., 14 CIT at 626-628.

<sup>6</sup> See e.g., Notice of Initiation of Antidumping Duty Investigations: Magnesium Metal From the People's Republic of China and the Russian Federation, 69 FR 15293, 15294, fn. 2 (Mar. 25, 2004) (the scope specifically excludes material covered by preexisting orders); see also Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China, 66 FR 49345, 49346 (Sept. 27, 2001) (scope language specifically carves out pure magnesium that is covered by a pre-existing order); Final Determination of Sales at Less Than Fair Value; Color Picture Tubes From Korea, 54 FR 44186, 44187 (Nov. 18, 1987) (the Department determined color picture tubes covered by the order on color television receivers are not covered by the scope of this proceeding).

<sup>7</sup> See e.g., Color Television Receivers From Korea; Intention to Review and Preliminary Results of Changed Circumstances Administrative Review and Tentative Determination to Revoke Antidumping Duty Order, 52 FR 6840 (March 5, 1987) (CTVs from Korea). In this case, the Department expressed concern that administering proceedings with overlapping scopes could pose a violation of its international obligations. The Department also acknowledged the administrative difficulty of conducting proceedings on two identical products, noting

The filing of {a petition with overlapping coverage} has presented the Department with the difficult situation of having to resolve the potentially conflicting scopes of two differnt (sic) antidumping duty proceedings. The inclusion of color picture tubes under both the television order and any order which might be issued on color picture tubes alone, could result in the assessment of double duties on the same merchandise....

See CTVs from Korea, 52 FR at 6841.

initiation of the instant investigation to include FCOJM on a company-specific basis was in accordance with our precedent, practice, and the law.

Comment 2: Scope “Clarification”

On March 31, 2005, the petitioners filed a request that the Department clarify that the scope of the instant investigation covers all exports of FCOJM from Brazil, including exports of merchandise previously covered by a separate antidumping duty order on FCOJ from Brazil. However, on June 27, 2005, we notified the petitioners that: 1) their request did not constitute a scope clarification, but rather a scope expansion; and 2) in order for the Department to consider revising the scope of the instant investigation as requested, the petitioners would need to amend the original petition. Because the petitioners did not submit such an amendment, the scope of the instant investigation remained unchanged.

The petitioners argue that the Department erred in not granting its request to “clarify” the scope. According to the petitioners, the Department’s practice has been to accord great weight to a petitioner’s scope definition because petitioners can best determine from what products they require relief. As support for this argument, the petitioners cite Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Japan, 59 FR 5987, 5988-5989 (Feb. 9, 1994) (Wire Rod from Japan). The petitioners note that the Department has granted scope clarifications in previous cases where the clarification was consistent with the intent of the petition. As support for this assertion, the petitioners cite Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (CIT 1988), affirmed, 898 F.2d 1577 (CAFC 1990) (Mitsubishi); and Final Determination of Sales at Less Than Fair Value: Personal Word Processors from Japan, 56 FR 31101, 31103-31104 (July 9, 1991) (PWPs from Japan). The petitioners assert that, in the instant case, the intent of the petition, as stated in that document, was to ensure that all exports of FCOJM and NFC from Brazil were covered by an antidumping duty order. According to the petitioners, at the time the petition was filed, the scope of the investigation accomplished that intention. However, the petitioners maintain that, once the Department revoked the previous order on FCOJ from Brazil, the scope of the petition was no longer complete. Thus, the petitioners claim that a clarification was necessary in order to make the language of the current scope consistent with the original intent of the petition. The petitioners contend that they did not ask the Department to expand the scope, but rather their request only included certain additional producers of the same covered product. The petitioners also assert that the scope clarification was timely filed, given that it was submitted more than three months before the preliminary determination.

Further, the petitioners maintain that their requested scope clarification would have had a minimal effect on the investigation because only two known Brazilian producers covered by the revoked order on FCOJ from Brazil (i.e. Branco Peres and Citrovida) have exported to the United States recently. Nonetheless, the petitioners note that Citrovida is a major producer and exporter of FCOJM in Brazil, and this company toll processes oranges for Montecitrus, a company already explicitly named under the current scope language. Thus, the petitioners claim that, because FCOJM produced by Citrovida is exported to the United States by Montecitrus, FCOJM

produced by Citrovita but owned by Montecitrus is already covered by the scope of this investigation. According to the petitioners, the scope clarification is essential in this case because, if the Department does not recognize that Citrovita is covered by the scope of this investigation, it will allow Citrovita to avoid the antidumping duty order by taking title in Brazil to the oranges it toll processes for Montecitrus. Regarding Branco Peres, the petitioners claim that Branco Peres is too small to supply the U.S. demand for orange juice. Hence, the petitioners claim that their proposed scope clarification would not have a negative effect on Branco Peres. Accordingly, the petitioners urge the Department to grant their request for a scope clarification.

Louis Dreyfus, Fischer, and Citrovita agree with the Department's decision to reject the petitioners' request for a scope clarification. According to these parties, this request is not merely a clarification, but rather it constitutes an unlawful expansion of the scope. Louis Dreyfus asserts that the Department limits scope clarifications to instances which neither expand nor contract the scope of an investigation. As support for this assertion, Louis Dreyfus cites Ericsson GE Mobile Communications, Inc. v. United States, 60 F. 3d 778, 780-83 (CAFC 1995); Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1172, 1187-88 (CIT 2004); Mitsubishi Elec. Corp. v. United States, 802 F. Supp. 455, 458-461 (CIT 1992); Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil the Republic of Korea, Mexico and Venezuela, 61 FR 11608, 11611 (Mar. 21, 1996) (Pipe and Tube from Brazil, Korea, Mexico, and Venezuela); and Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany, 61 FR 38166, 38169 (July 23, 1996) (LNPP from Germany). According to Louis Dreyfus, a clarification of the scope would only be necessary if there were ambiguity or doubt in the wording of the scope. Louis Dreyfus asserts that this fact pattern is not present here, given that, in this case, both the petition and the Department's notice of initiation were crafted specifically to include only FCOJM not subject to the now-revoked antidumping duty order on FCOJ from Brazil.

Moreover, Fischer argues that if the petitioners' true intent was to ensure that all exports of FCOJM and NFC were covered by an antidumping duty order and the petitioners had anticipated the revocation of the previous order on FCOJ from Brazil, then the petitioners should have waited to file the petition until after the revocation. Fischer asserts that the petitioners then could have filed a petition without circumventing the Department's regulations and the Act. According to Fischer, the petitioners induced the Department illegally to initiate an investigation against a fraction of an industry producing the subject merchandise.

Further, Louis Dreyfus disagrees with the petitioners that the impact of the scope clarification here is legally relevant. Louis Dreyfus asserts that the Department has never considered the effects of a scope expansion as the basis for determining whether the expansion is warranted. As support for this assertion, Louis Dreyfus cites Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 FR 37062, 37067-37068 (July 9, 1993) (Steel Flat Products from Argentina); PWPs from Japan, 56 FR at 31104-31106; and Final Determination of Sales at Less than Fair Value: Certain Internal Combustion Industrial Forklift Trucks from Japan, 53 FR 12552, 12566-12567 (Apr. 15, 1988) (Forklifts

from Japan). Louis Dreyfus contends that this is not surprising, given that a true clarification has no effect on an investigation because it simply confirms the inclusion of merchandise which was always subject to it. As support for this assertion, Louis Dreyfus cites Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete from Japan, 62 FR 24394, 24396-24399 (May 5, 1997); and LNPP from Germany, 61 FR at 38168-38171. In any event, Louis Dreyfus asserts that, contrary to the petitioners' claims, the petitioners' requested change would have a significant impact on this investigation because: 1) it would affect Brazilian exporters of FCOJM other than Branco Peres and Citrovia, including Coinbra-Frutesp and Bascitrus (among others); 2) the absence of FCOJM exports by Citrovia and Branco Peres during the POI is meaningless with respect to future exports; and 3) in addition to toll processing for Montecitrus, Citrovia also engages in its own production of orange juice, a fact of which the petitioners are clearly aware given that certain petitioning companies purchase FCOJM from Citrovia. Thus, Louis Dreyfus contends that exports of FCOJM produced by companies excluded from this investigation constitute a significant portion of both FCOJM production in Brazil and FCOJM exports to the United States. Hence, Louis Dreyfus claims that expanding the scope would significantly alter the foundation upon which all the Department's determinations and administrative actions have been made in the instant investigation with regard to FCOJM, calling into question the legitimacy of the investigation.

In addition, Louis Dreyfus and Citrovia assert that it is against the Department's practice and regulations to expand the scope of the investigation in the middle of a proceeding. As support for this assertion, Louis Dreyfus and Citrovia cite Preliminary Affirmative Countervailing Duty Determination: Certain Pasta From Italy, 60 FR 53739, 53740 (Oct. 17, 1995) (Pasta from Italy); Steel Flat Products from Argentina 58 FR at 37067-37068; and PWPs from Japan, 56 FR at 31105-31106. Furthermore, Louis Dreyfus and Citrovia point out that the Department notified the petitioners before the preliminary determination that an amended petition was the proper procedure for seeking a change in the scope of this investigation, and the petitioners' case brief fails to address their disregard for such an amendment.

Finally, Citrovia states that the petitioners have offered no substantive reasoning to support their scope clarification request, and the cases cited by them are not on point. Specifically, Citrovia contends that these cases do not support the modification of an unambiguous scope to cover expressly excluded merchandise. Rather, Citrovia asserts that, in those cases, unlike here, the scope modifications were clearly consistent with the intent of the petitions. Thus, Citrovia maintains that, because the petitioners offered no reason to change the scope of this investigation, the Department should not consider the petitioners' request for the final determination.

#### Department's Position:

On March 31, 2005, the petitioners filed a request that the Department clarify the scope of the instant investigation to include exports of FCOJM which were previously covered by the then-existing antidumping duty order on FCOJ from Brazil. After carefully considering this request, on June 27, 2005, the Department rejected it, stating the following reasons:

Because of the pre-existing order on frozen concentrated orange juice from Brazil, the language in the scope of the instant investigation was drafted clearly to include only those companies not covered by that order. As such, we concluded that your request, as submitted, cannot serve as the basis for a scope clarification, and is, therefore, denied.

Nonetheless, we note that it is the Department's practice to accord the petitioners' scope description great weight in an investigation because the petitioners can best determine from what products they require relief. See Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod From Japan, 59 FR 5987 (Feb. 9, 1994). As a result, any revision of the scope in the instant investigation to include FCOJM produced or exported by the excluded companies would require, at a minimum, an amendment of the petition.

As noted above, the scope of this case explicitly excludes specific companies. Because the scope language is not ambiguous as to the companies and products covered, we continue to find that the petitioners' request cannot be characterized as a mere "clarification."

In Mitsubishi, the Court affirmed the Department's recognition and inclusion of subassemblies of telephones to keep up with the ever-evolving technology that rendered inadequate the scope defined in the petition. See Mitsubishi, 700 F.Supp. at 555. Such is not the case here. In the instant case there are no analogous changes that affect the clarity of the scope. Rather the petitioners' requested change to the scope would constitute an expansion of the scope contained in the petition.

As we informed the petitioners in June 2005, in order for the Department to consider expanding the scope of this proceeding to include companies and products which are explicitly not covered by the current scope, the petitioners would need to file an amendment to the petition with both the Department and the International Trade Commission (ITC), in accordance with section 732(b) of the Act. Although we notified the petitioners of this requirement, they did not amend their petition at any point in this proceeding.

Because section 732(b) of the Act requires simultaneous filing of petition amendments with both agencies, we are unable to accept the petitioners' request as a proper amendment on our own. Moreover, such an action would be inappropriate at this point in the proceeding, given the Department's practice, as upheld by the Courts, of not accepting petitioners' amendments after the date of the preliminary determination. See Allegheny Bradford, 342 F.Supp. at 1188-89 (where the Court of International Trade (CIT) reiterated that the Department may not expand the scope of an investigation in the latter stages of a proceeding because of due process concerns).

In addition, we find that the petitioners' reliance on PWPs from Japan is misplaced, as the Department denied the petitioner's request to expand the scope of that investigation because the product at issue was specifically excluded from the scope of the petition. Thus, we find that PWPs from Japan supports the Department's denial of the petitioners' request to modify the scope of the instant investigation. Similarly, we find that Steel Flat Products from Argentina and

Forklifts from Japan also support the Department's position here because, in each of these cases, the Department denied the petitioner's request to expand the scope because the petitioner had clearly excluded from the scope in the petition the items it later sought to include.

We disagree with the petitioners' statement that their intent was to cover all exports of FCOJM from Brazil under an antidumping duty order. At the time that this case was initiated, all exports of FCOJM from Brazil were, in fact, covered by an antidumping duty proceeding. However, the petitioners themselves withdrew their support from the ITC's sunset proceeding, thereby creating the gap in coverage. See the December 27, 2004, petition at page 2. The petitioners subsequently failed to amend the petition to remedy this alleged deficiency despite the fact that the Department provided them with explicit guidance on the issue. Thus, we find the petitioners' arguments in this regard to be unpersuasive.

Finally, we find unpersuasive the petitioners' argument that, without a scope "clarification," Montecitrus will be able to avoid any antidumping duty order issued pursuant to this investigation by transferring the title of oranges toll-processed by Citrovita for Montecitrus to Citrovita. First, subject merchandise produced by Montecitrus, whether or not processed by a toller in Brazil, is clearly covered by the scope of this investigation. The scope of this investigation, which reflects the scope of the petition, clearly includes merchandise produced by Montecitrus regardless of exporter. Finally, any allegation of circumvention of any antidumping duty order issued pursuant to this investigation will be properly addressed if and when it is raised before the Department.

Comment 3: *Successor-in-Interest Determination for Coinbra-Frutesp*

As noted above, the scope with regard to FCOJM covers only FCOJM produced and/or exported by those companies that were excluded or revoked from the existing antidumping duty order on FCOJ from Brazil as of December 27, 2004. Two of these entities were companies named Coopercitrus Industrial Frutesp (Frutesp) and Frutropic S.A. (Frutropic). After revocation, for Frutesp, and before revocation, for Frutropic, both of these companies experienced changes in their corporate organization and are now doing business collectively under the name Coinbra-Frutesp.

In both our notice of initiation and the preliminary determination, we stated that we intended to make a successor-in-interest finding with respect to Coinbra-Frutesp in order to determine whether its exports of FCOJM are subject to this proceeding. As part of this announcement, we indicated that the scope of this case would cover Coinbra-Frutesp's FCOJM exports if we find it to be the successor-in-interest to Frutesp and/or Frutropic since these companies were revoked from the then-existing order on FCOJ from Brazil.

Coinbra-Frutesp disagrees that the Department has the authority to include its exports of FCOJM in the scope of this case. Coinbra-Frutesp bases this conclusion on the following claims: 1) both before and after the initiation of this case, the Department considered Coinbra-Frutesp to be subject to the pre-existing antidumping duty order on FCOJ, as evidenced by the Department's

conditional exclusion of the company from this investigation pending the results of a changed circumstances review initiated under the prior order; and 2) the Department rescinded the changed circumstances review before making a ruling, thereby precluding it from ever determining that Coinbra-Frutesp was revoked from the old order. According to Coinbra-Frutesp, the consequences of these actions are significant because they fixed the company's liability under the old order and forced all entries to be liquidated under the rates prevailing at the time of revocation, resulting in a "default" finding that Coinbra-Frutesp was legally not the successor-in-interest to either Frutesp or Frutropic.<sup>8</sup> Coinbra-Frutesp claims that this analysis is shared by the petitioners, given that the petitioners filed comments in March 2005 stating that "a successor-in-interest inquiry is moot at this point since it wholly relates to an antidumping order which no longer exists." See the petitioners' March 31, 2005, letter at 8.

In any event, Coinbra-Frutesp contends that the plain language of the Act precludes the Department from including the company's exports in the scope of the instant investigation because it requires the Department to apply the final determination to the same merchandise involved in both the Department's and the ITC's preliminary determinations. According to Coinbra-Frutesp, because the ITC excluded the company's exports from its preliminary determination, the Department cannot now include these exports in its scope without violating the principles set forth in the Act. Coinbra-Frutesp contends that this conclusion is consistent not only with CIT rulings which prohibit mid-stream scope expansions (see Smith Corona Corp. v. United States, 796 F. Supp. 1532, 1535 (CIT 1992) (Smith Corona) and Allegheny Ludlum Corp. v. United States, 116 F. Supp. 2d 1276, 1280 n. 6 (CIT 2000) (Allegheny Ludlum)), but also with the Department's own practice of not expanding the scope after the initiation of an investigation (see LNPP from Germany, 61 FR at 38169; Pipe and Tube from Brazil, Korea, Mexico, and Venezuela, 61 FR at 11611; and Pasta from Italy, 60 FR at 53740).

Coinbra-Frutesp argues that there are valid policy concerns behind the Department's practice of prohibiting scope expansions, including the need for: 1) a logical correlation between the scope of injury and dumping determinations; 2) a mechanism to prevent scope manipulations; and 3) procedural fairness, both in permitting participation by affected exporters and in establishing the requisite industry support. Coinbra-Frutesp claims that these concerns are particularly relevant in this case because the Department's decision to exclude Coinbra-Frutesp's exports from the scope of the investigation deprived the company of the opportunity to submit a voluntary questionnaire response and to defend its interests here. Coinbra-Frutesp claims that this was especially unfair given that the Department would have likely accepted a voluntary response from the company in light of its large volume of U.S. exports during the POI. Furthermore, Coinbra-Frutesp asserts that it would be similarly unfair to subject the company's exports of FCOJM to this investigation at this point in the proceeding because the Department has solicited no information from

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<sup>8</sup> As a side argument, Coinbra-Frutesp implies that it would be unfair for the Department now to make an affirmative successor-in-interest determination because Coinbra-Frutesp would be unable to receive a refund of the antidumping duties paid under the old order, even though it would be entitled to one.

Coinbra-Frutesp regarding the successor issue, and thus it has not allowed Coinbra-Frutesp to present its case fully.

Notwithstanding the above statements, however, Coinbra-Frutesp contends that the facts on the record demonstrate that it is not the successor-in-interest to either Frutropic or Frutesp. Coinbra-Frutesp acknowledges that it initially claimed to be the successor-in-interest to these companies (see the petitioners' comments below), but it maintains that, to the extent that there has been any inconsistency in its position, this was attributable to an evolving understanding of the law and the facts relevant to their changes in ownership. Coinbra-Frutesp claims that it did not examine the successor issue in detail until it was instructed by the Department to submit a request for a changed circumstances review, and at that time it believed in good faith that it was the successor to both companies. However, Coinbra-Frutesp claims that, after further examination of the facts, it now believes that it is not in fact the successor-in-interest to either.

Coinbra-Frutesp maintains that the petitioners' contention that it is the successor-in-interest to both companies (see below) is based on self-serving statements which were taken out of context. For example, Coinbra-Frutesp asserts that the petitioners' statement that it is affiliated with both companies – and thus cannot be a new entity under the dumping law – is inaccurate, given that both companies were formally dissolved upon their acquisition by Louis Dreyfus (an affiliate of Coinbra-Frutesp). As a result, Coinbra-Frutesp contends that the case precedent relied upon by the petitioners to support their argument (*i.e.*, Marine Harvest (Chile) S.A. v. United States, 244 F. Supp. 1364, 1380 (CIT 2002) (Marine Harvest)) is inapposite.

More significantly, however, Coinbra-Frutesp contends that when the facts on the record of this case are analyzed under the Department's four-factor test, it is clear that it is not the successor-in-interest to either company. Specifically, Coinbra-Frutesp notes that the Department considers the following criteria: 1) management; 2) production facilities; 3) supplier relationships; and 4) customer base. According to Coinbra-Frutesp, immediately after the change in ownership of Frutesp and Frutropic, the Louis Dreyfus Group replaced many of the companies' managers and staff with new employees; it closed various administrative offices and eventually centralized all administrative functions in one location; it made significant capital improvements in the production facilities; it added new suppliers and purchased its own orange groves; and it not only completely changed its U.S. customer base and product mix, but also closed Frutesp's U.S. sales office. Thus, Coinbra-Frutesp argues that the condition for including Coinbra-Frutesp's exports of FCOJM in the scope of this investigation has not been met.

The petitioners disagree and argue that Coinbra-Frutesp is, in fact, the successor-in-interest to both Frutropic and Frutesp. According to the petitioners, it is irrelevant that Coinbra-Frutesp's entries of FCOJM were liquidated at the "All Others" rate under the old order because this action was initiated and performed by U.S. Customs and Border Protection (CBP), and thus it has no bearing on whether the Department viewed Coinbra-Frutesp to be covered by the order. Indeed, the petitioners contend that it is a leap of logic to suggest that the Department found Coinbra-Frutesp to be covered by the old order given that: 1) Coinbra-Frutesp imported FCOJM under the old order for more than ten years without paying dumping duties; and 2) Coinbra-Frutesp itself

requested the rescission of the changed circumstances review. In fact, regarding the first point, the petitioners assert that, if Coinbra-Frutesp knowingly imported subject merchandise for many years without paying duties, this would be a potential case of customs fraud.

Moreover, the petitioners disagree that the Department is precluded from examining the successor-in-interest issue in this proceeding or that the rescission of the changed circumstances review imparted a final decision on the issue. The petitioners point out that the Department clearly indicated in the notice of initiation that it intended to examine this issue in the context of this investigation, and they note that the scope published in both that notice and in the preliminary determination plainly was crafted to cover Coinbra-Frutesp on a conditional basis, subject to the successor-in-interest determination. The petitioners also note that there is nothing in the statute or regulations to suggest that the Department cannot review a successor-in-interest issue in the context of an investigation. Rather, they maintain that this is simply a factual issue and, contrary to its assertions, Coinbra-Frutesp was at liberty to present any and all factual information relating to this issue up until seven days prior to verification.

Regarding the merits of the issue, the petitioners contend that Coinbra-Frutesp is, by its own admission, the successor-in-interest to both companies. The petitioners note that Coinbra-Frutesp initially claimed that the ownership change merely involved the integration of the assets of the two companies into the Louis Dreyfus Group and the change of business name to Coinbra-Frutesp. In addition, the petitioners note that these actions with respect to Frutropic occurred prior to the revocation of Frutropic's exports from the previous antidumping duty order on FCOJ. According to the petitioners, the Department should not disregard these statements simply because Coinbra-Frutesp realized its interests could be better served by reversing its position completely after the new petition was filed.

Moreover, the petitioners assert that since Coinbra-Frutesp is affiliated with one or two former exporters (*i.e.*, Frutropic, Frutesp, or both) which were in business at the time of the issuance of the antidumping duty order on FCOJ from Brazil, it cannot be a new entity under the antidumping statute, consistent with the CIT's ruling in Marine Harvest. The petitioners draw from this conclusion that, if Coinbra-Frutesp is not a new entity, it would have to be a successor-in-interest to at least one of the two companies.

Finally, the petitioners disagree that Coinbra-Frutesp was procedurally harmed in this case. First, the petitioners assert that imports of Frutesp and Frutropic were covered, at least nominally, by the ITC's determination because the ITC made a preliminary determination of injury with respect to subject merchandise (*i.e.*, the products at issue, not the companies which exported them). Second, the petitioners maintain that inclusion of Coinbra-Frutesp's imports in the scope of this case would not constitute a scope expansion, given that such a determination would not change a single word or meaning in the existing scope language. Finally, the petitioners argue that Coinbra-Frutesp was granted all the due process and fair opportunity to present its case that is afforded by law because: 1) it was free to submit factual information within the regulatory time limits; 2) it was formally put on notice that the Department was investigating the successor-in-interest issue, it was issued a questionnaire on this topic, and it responded to this questionnaire in

March 2005; 3) it not only had the opportunity to participate in the ITC's preliminary investigation, but also a senior executive from Coinbra-Frutesp testified at the ITC's preliminary hearing; 4) the Department did not direct CBP to suspend liquidation of Coinbra-Frutesp's entries of FCOJM after the preliminary determination, and thus Coinbra-Frutesp was not adversely affected by the decision to postpone the successor-in-interest determination; 5) the issue of industry support was not compromised in this case by the successorship issue because the petitioners themselves represented a sufficient percentage of the industry for the Department to initiate the case; and 6) the Department's decision not to investigate Coinbra-Frutesp individually had nothing to do with the fact that the successor-in-interest issue was unresolved, but rather was attributable to the fact that the Department decided to limit the investigation to the three largest exporters. Regarding this latter point, the petitioners note that the Department did not limit the named respondents to only those without unresolved successorship issues (as evidenced by its conditional selection of one company with a pending successorship decision) and Coinbra-Frutesp never requested to be investigated as a voluntary respondent.

Thus, the petitioners contend that the Department should find Coinbra-Frutesp to be the successor-in-interest to both Frutesp and Frutropic and include its exports of FCOJM in the scope of this proceeding.

Department's Position:

In our notice of initiation, as well as in our preliminary determination, we indicated that we intended to make successor-in-interest determinations with respect to Frutesp and Frutropic in order to determine if the FCOJM produced and/or exported by Coinbra-Frutesp falls within the scope of this proceeding. We disagree with Coinbra-Frutesp that we are prohibited from performing this analysis under the antidumping law, and we note that Coinbra-Frutesp did not cite any statutory authority for its position. Thus, while the Act does not expressly provide for this type of determination in an LTFV investigation, we find that it also does not expressly prohibit it. Given that a formal successor-in-interest determination is necessary in this case for the proper administration of this proceeding, we have performed one for purposes of the final determination.

In making a normal successor-in-interest determination, the Department generally examines several factors including, but not limited to, changes in: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base. See Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber From Japan, 67 FR 58 (Jan. 2, 2002) (Polychloroprene Rubber from Japan), and Brass Sheet and Strip from Canada: Notice of Final Results of Antidumping Administrative Review, 57 FR 20460 (May 13, 1992) (Brass Sheet and Strip from Canada). While no one of these factors is dispositive, the Department will generally consider the new company to be the successor to the previous company if its resulting operation is not materially dissimilar to that of its predecessor. See Industrial Phosphoric Acid from Israel: Final Results of Changed Circumstances Review, 59 FR 6944 (Feb. 14, 1994).

Further, in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom: Final Results of Changed Circumstances Antidumping and Countervailing Duty Antidumping Reviews, 64 FR 66880 (Nov. 30, 1999), the Department affirmed the preliminary results in the changed circumstances reviews of both the antidumping and countervailing duty orders where the Department also utilized the factors mentioned above in making a successor-in-interest determination. Therefore, in the instant investigation, we have used the same approach to determine whether Coinbra-Frutesp is the successor-in-interest to one or both of the Louis Dreyfus entities revoked from the previous antidumping duty order on FCOJ from Brazil.

As a threshold matter, we note that at the time of its revocation from the order, Frutropic no longer existed as a legal entity. Rather, this company had been formally dissolved and incorporated into its parent company, Comercia e Industrias Brasileiras Coinbra S.A. (Coinbra). Because this change in corporate organization was limited to a change in name only, we find that the revocation determination also properly applied to Coinbra. Thus, the question before us here is whether Coinbra-Frutesp is the successor-in-interest to Coinbra (as it existed at the time of revocation).

Beginning in 1993 (after the acquisition of Frutesp by the Louis Dreyfus Group), Coinbra began integrating its orange juice operations with those of Frutesp. Specifically, it eliminated the administrative offices of Frutesp and replaced a significant proportion of Frutesp's employees (including all of its management) with its own. After the merger, Coinbra-Frutesp sold all of its orange juice production in the United States exclusively: 1) through Louis Dreyfus's affiliated companies; and 2) to Coinbra's previously existing customers. Thus, the management structure and selling practices of the post-merger Coinbra-Frutesp closely resembled those of the pre-merger Coinbra. In addition, the post-merger Coinbra continued to produce orange juice in Coinbra's (and Frutesp's) production facilities. Regarding suppliers, the administrative record is silent as to any changes made by Coinbra-Frutesp to Coinbra's supplier base. However, as noted above, no one factor is dispositive in our analysis, and thus we find that there is sufficient data on the record to reach a reasoned conclusion absent this information.

After analyzing the above facts, we find that the post-merger entity Coinbra-Frutesp is the successor-in-interest to Coinbra because the evidence on the record demonstrates that Coinbra-Frutesp contains significant elements of Coinbra (as it existed prior to the merger). Thus, we find that FCOJM produced and/or exported by Coinbra-Frutesp is subject to this investigation because Coinbra-Frutesp was not covered by the former antidumping duty order on FCOJ from Brazil. For further discussion, see the January 6, 2006, memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary, Import Administration, entitled "Successor-In-Interest Determination for Coinbra-Frutesp in the Less-Than-Fair-Value Investigation on Certain Orange Juice from Brazil." This determination is consistent with the Department's successor-in-interest findings in other proceedings. See, Final Results of Redetermination Pursuant to Court Remand Marine Harvest (Chile) S.A. v. United States, Court No. 01-00808 ( Jan. 7, 2003) (where the Department found that a new corporate entity was the successor-in-interest to two merged companies because the new entity retained

significant elements of the two pre-merger entities).<sup>9</sup> Because we find that Coinbra-Frutesp is the successor-in-interest to Coinbra, it is unnecessary to perform a successor-in-interest analysis with respect to Frutesp.<sup>10</sup>

We disagree with Coinbra-Frutesp that the Department is prohibited from finding that Coinbra-Frutesp was revoked under the old order because the Department allegedly made a “default” decision on the issue in the context of the previous order. Although we did terminate the changed circumstances review related to this issue, we did so at Coinbra-Frutesp’s request. See Notice of Rescission of Changed Circumstances Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice from Brazil, 70 FR 19417 (Apr. 13, 2005). Further, our decision to terminate the changed circumstances review did not affect a single entry by Coinbra-Frutesp as of the effective date of the revocation of the prior order: 1) because rulings in changed circumstances reviews are prospective in nature (*i.e.*, they do not apply to entries made before the ruling); and 2) after revocation of the prior order, we directed CBP to discontinue suspension of liquidation of all entries under that order. Moreover, we disagree as a legal matter that this action fixed the company’s liability under the old order. Had Coinbra-Frutesp wished the Department to examine this issue with respect to any unliquidated entries prior to revocation, the appropriate recourse would have been to request that the Department conduct an administrative review in

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<sup>9</sup> We disagree with Coinbra-Frutesp's interpretation of Marine Harvest and its applicability to the successor-in-interest determination. The Court in Marine Harvest found compelling the fact that the new entity was comprised of "and "came into being by" merging two entities with "nothing extraneous added to the mix." Marine Harvest, 244 F. Supp. at 1380. Similarly here, Coinbra-Frutesp is the product of merging Frutropic (or Coinbra-Frutropic as requested by that entity prior to revocation from the order and termination from the subsequent administrative review (see Notice of Preliminary Results of Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice from Brazil, 60 FR 41874 (Aug. 14, 1995)) and Frutesp. Moreover, nothing in the record evidence suggests that any other entities were "added" to the merged entity. Thus, we continue to believe that the court's reasoning in Marine Harvest supports our determination.

<sup>10</sup> Nonetheless, we note that, for more than a decade prior to the initiation of this case, Coinbra-Frutesp represented itself to CBP as the successor-in-interest to Frutesp for cash deposit purposes under the former order on FCOJ from Brazil, and eventually asked the Department to consider officially this representation in the context of a changed circumstances review of the former order after CBP began collecting cash deposits on its entries in 2003. While that review was rescinded after the revocation of the former order and Coinbra-Frutesp explains that it subsequently changed its view of its status as successor-in-interest in the instant proceeding based on further investigation of the facts and history surrounding the corporate changes involved, the Department is nevertheless concerned by the widely inconsistent representations of the same facts made to two different federal government agencies, particularly because Coinbra-Frutesp did not attempt to seek guidance on its own from either agency prior to 2003 when the matter was raised by CBP officials.

order to permit it to determine Coinbra-Frutesp's dumping liability for those specific entries. Because Coinbra-Frutesp chose not to request such a review, the entries in question were liquidated in accordance with the Department's normal policy regarding unreviewed transactions. Furthermore, because this liquidation resulted from Coinbra-Frutesp's own failure to request a review, it also cannot be characterized as unfair.

We similarly disagree with Coinbra-Frutesp that the Department conditionally excluded its exports from the scope of this proceeding. Both our initiation notice and our preliminary determination clearly indicated that exports and/or production of FCOJM by any successor-in-interest to Frutropic and/or Frutesp were covered by the scope. These notices also set forth the steps that the Department intended to take to resolve the successor question. While we did not direct CBP to suspend liquidation of entries of Coinbra-Frutesp's FCOJM after the preliminary determination, this action was a direct result of the decision by the ITC to make no preliminary injury finding with respect to these exports. Without a preliminary finding of material injury or threat of material injury, the Department is prohibited from imposing provisional measures on the affected entries, according to section 731 of the Act. However, we will notify the ITC that Coinbra-Frutesp's exports of FCOJM are part of the class or kind of merchandise under investigation, and we anticipate that the ITC will include these exports in its final injury determination. If the ITC's final determination is affirmative, we will instruct CBP to begin suspending liquidation of any entries of FCOJM produced and/or exported by Coinbra-Frutesp after the date of publication of that determination.

Given that, from the outset of this investigation, the scope of this proceeding has explicitly covered FCOJM produced and/or exported by any successor-in-interest to Frutropic or Frutesp, we disagree that our inclusion of Coinbra-Frutesp constitutes an expansion of the scope, unlawful or otherwise. As a result, we find that Coinbra-Frutesp's reliance on Smith Corona, Allegheny Ludlum, LNPP from Germany, Pipe and Tube from Brazil, Korea, Mexico, and Venezuela, and Pasta from Italy is misplaced.

Finally, we disagree with Coinbra-Frutesp that it has been treated unfairly in this investigation. As noted above, our notice of initiation, as well as our preliminary determination, explicitly stated that we intended to conduct a successor-in-interest determination in this proceeding and, based on the Department's findings, the potential existed that Coinbra-Frutesp's FCOJM would be subject to this investigation. Moreover, we solicited the information necessary to conduct the successor-in-interest analysis from Coinbra-Frutesp (despite its assertions to the contrary), accepted and considered all comments related to this issue, and permitted Coinbra-Frutesp to participate in the public hearing.

We similarly disagree that Coinbra-Frutesp's interests were prejudiced by any of the administrative decisions taken in this case. As the petitioners correctly point out, the petitioners themselves represent a sufficient portion of the domestic industry to meet the requirements for industry support under the Act. Given that they agree that Coinbra-Frutesp's FCOJM should be subject to this proceeding, it would not be logical to conclude that this decision could have any impact on our finding of industry support. Furthermore, contrary to Coinbra-Frutesp's

assertions, we permitted Coinbra-Frutesp to participate fully in the respondent selection process in this case. Not only did we provide the company with a copy of our decision memorandum on this topic, but we also included the company's export volumes in our respondent selection analysis. Further, we note that the mandatory respondents were selected on the basis of U.S. export volumes. See section 777A(a)(1) of the Act. The respondent selection memorandum set forth the conditions under which it would accept voluntary responses. At no point in this proceeding did Coinbra-Frutesp request to submit a voluntary response or to provide additional information. Therefore, we find that Coinbra-Frutesp's arguments are without merit.

Comment 4: *Critical Circumstances*

Prior to the preliminary determination in this case, the petitioners made a timely allegation that critical circumstances exist with respect to imports of certain orange juice from Brazil. Accordingly, pursuant to section 732(e) of the Act, we requested information from the two participating respondents in this case, Cutrale and Fischer, regarding their monthly shipments to the United States during the period June 2001 through June 2005. Although we received this data on August 11, 2005, we were unable to consider this information for our critical circumstances analysis because it was received too close to the date of the preliminary determination. Therefore, we used information obtained from the USITC Interactive Tariff and Trade Data Web (USITC dataweb) for our preliminary critical circumstances analysis.

We used five-month comparison and base periods to determine whether imports of the subject merchandise had been massive because May 2005 was the latest month for which complete data existed at the time of the preliminary determination. Based on our analysis, we preliminarily found that Cutrale, Fischer, Montecitrus, and the companies subject to the "All Others" rate satisfied the imputed knowledge of injurious dumping criterion under section 733(e)(1)(A)(ii) of the Act and the massive import criterion, in accordance with 733(e)(1)(B) of the Act. See Preliminary Determination, 70 FR at 49566.

Fischer contends that the Department's decision not to use its company-specific import data in its preliminary critical circumstances analysis was contrary to law. First, Fischer notes that the submission containing its import data was not only timely, but it consisted of a single page of information. Therefore, Fischer claims that, although the Department only had four days to analyze this data prior to the preliminary determination, this time period should have been sufficient.

Moreover, Fischer asserts that its data shows a drastic reduction in its imports during the five-month period examined by the Department. According to Fischer, it is the Department's practice to make a determination of whether or not imports of the subject merchandise were massive on a company-specific basis. As support for this assertion, Fischer cites Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55805, 55807 (Aug. 30, 2002). Fischer states that, because its submitted import data was verified, it must be used in the Department's critical circumstances analysis for the final determination. Consequently,

according to Fischer, the Department must conclude that critical circumstances do not exist with regard to it for the final determination. Fischer maintains that the petitioners agree with this argument, given that they contended in their case brief that critical circumstances exist for all companies except Fischer (see below).

The petitioners contend that the Department should continue to find that critical circumstances exist for purposes of the final determination. Specifically, the petitioners contend that the first prong of the Department's critical circumstances test, set forth under section 735(a)(3)(A) of the Act, continues to have been met in this case because: 1) importers knew or should have known that exporters were selling subject merchandise at LTFV because the dumping margins found in the preliminary determination exceeded 25 percent, and there is no reason for the Department to revise this finding; and 2) there is a history of injurious dumping of certain orange juice from Brazil. Regarding this latter point, the petitioners disagree with the Department's preliminary finding that the prior antidumping duty order on FCOJ from Brazil does not qualify as a "history" of dumping. According to the petitioners, the Department generally considers both current and previous antidumping duty orders on subject merchandise from the country in question in the United States or any other country in determining whether a history of dumping exists. As support for this assertion, the petitioners cite Partial Affirmative Preliminary Determination of Critical Circumstances: Chlorinated Isocyanurates from the People's Republic of China, 70 FR 18362, 18364 (Apr. 11, 2005) (Isocyanurates from the PRC). The petitioners note that the dumping order on FCOJ was in effect until April 2005, and they contend that the fact that the order was revoked while this investigation was pending is irrelevant as to a determination of a history of dumping. Moreover, the petitioners assert that imports of in-scope merchandise in this case are predominantly of FCOJM; thus, the petitioners argue that the Department erred in not considering the previous order on FCOJ from Brazil as evidence of a history of dumping simply because that order did not cover NFC.

In addition, the petitioners contend that the second prong of the critical circumstances test, set forth under section 735(a)(3)(B) of the Act, has also been met with respect to Cutrale, Montecitrus, and companies subject to the "All Others" rate. While the petitioners acknowledge that there are two additional months of import data now available for use in the Department's determination as to whether imports were massive, they assert that the results of the analysis should not be any different from those reached in the preliminary determination. Regarding Cutrale, the petitioners note that the Department was unable to verify Cutrale's import figures, and thus they urge the Department to find that Cutrale's imports were massive using AFA. Nonetheless, the petitioners claim that, even were the Department to use Cutrale's unverifiable data, the record evidence still shows that its imports increased by more than 15 percent in the relevant period. Similarly, the petitioners note that the Department has already determined that Montecitrus' decision to withdraw from the investigation warrants the use of AFA, and they request that the Department continue to find that Montecitrus' imports were massive on that basis. Finally, regarding the companies subject to the "All Others" rate, the petitioners contend that, when Cutrale's and Fischer's imports are removed from the USITC dataweb data, it is clear that imports from these companies were massive as well.

Regarding Fischer, the petitioners recognize that the company-specific data submitted after the preliminary determination shows a decline in imports. Nonetheless, the petitioners urge the Department to continue to find that critical circumstances exist for Fischer because: 1) there appear to be serious discrepancies between the total volume of imports reflected in the USITC dataweb and those reported by the respondents in this case; and 2) the Department found that Fischer failed to report certain U.S. sales during the verification of its sales data in Brazil. According to the petitioners, Fischer's failure to report U.S. sales during the POI "naturally" raises the question of whether Fischer may have also failed to report additional U.S. sales made in the comparison period used to determine critical circumstances. Because of this possibility, the petitioners argue that an affirmative finding of critical circumstances for Fischer is also warranted in the final determination.

Cutrale did not comment on this issue.

Department's Position:

Section 735(a)(3) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether:

- (A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
  - (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there would be material injury by reason of such sales, and
- (B) there have been massive imports of the subject merchandise over a relatively short period.

In this case, we continue to find that critical circumstances exist for Cutrale, Montecitrus, and the companies covered by the "All Others" rate. However, we now determine that critical circumstances do not exist for Fischer.

As noted above, in order to make an affirmative finding of critical circumstances, the Department must find that one of the two criteria under section 735(a)(3)(A) of the Act has been met, as well as finding the imports have been massive within the meaning of section 735(a)(3)(B) of the Act.

Regarding section 735(a)(3)(A)(i) of the Act, the Department generally considers a current or previous antidumping duty order on subject merchandise in any country as evidence of a history of injurious dumping. In their July 25, 2005, submission, the petitioners made no statement concerning a history of dumping for certain orange juice from Brazil, nor did any other interested party provide evidence of an antidumping duty order on subject merchandise in the United States or any other country. Rather, the petitioners merely claimed that the Department should consider

the pre-existing order on FCOJ from Brazil as sufficient to find a history of dumping. However, we disagree that the previous order on FCOJ demonstrates a history of dumping of subject merchandise because there is no overlap in the scope of that order and this proceeding. Indeed, the scope in this case was carefully crafted to avoid overlap with the now revoked order on FCOJ from Brazil, as that order was still in place at the time we initiated this investigation. This situation stands in marked contrast to the fact pattern in Isocyanurates from the PRC. In that case, the Department found that an order on a component product of subject merchandise in Mexico was evidence of a history of injurious dumping, but there, unlike here, the Mexican order covered the same products and producers. Therefore, the Department does not find a history of injurious dumping of certain orange juice from Brazil pursuant to section 735(a)(3)(A)(i) of the Act.

Regarding section 735(a)(3)(A)(ii) of the Act, we find that importers of subject merchandise produced and/or exported by Cutrale and Montecitrus knew or should have known that these companies were selling the subject merchandise at LTFV because the final dumping margins calculated for them exceeded the threshold sufficient to impute knowledge of dumping (i.e., 15 percent for CEP sales and 25 percent for EP sales). This finding is consistent with our practice regarding importer knowledge. See, e.g., Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China, 62 FR 31972, 31978 (June 11, 1997) (unchanged by the final determination). However, we find that importers did not have knowledge Fischer was selling the subject merchandise at LTFV because the final dumping margin for it does not exceed the threshold sufficient to impute knowledge of dumping.

Regarding the companies subject to the “All Others” rate, it is the Department’s normal practice to conduct its critical circumstances analysis for these companies based on the experience of investigated companies. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey, 62 FR 9737, 9741 (Mar. 4, 1997). However, the Department does not automatically extend an affirmative critical circumstances determination to companies covered by the “All Others” rate. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan, 64 FR 30574 (June 8, 1999) (Stainless Steel from Japan). Instead, the Department considers the traditional critical circumstances criteria with respect to the companies covered by the “All Others” rate. Consistent with Stainless Steel from Japan, the Department has, in this case, applied the traditional critical circumstances criteria to the “All Others” category for the antidumping investigation of certain orange juice from Brazil.

In determining whether there is a reasonable basis to believe or suspect that importers knew or should have known that exporters were selling certain orange juice from Brazil at LTFV, we look to the “All Others” rate, which is based on the weighted-average rate of all investigated companies where the margin is not based on adverse facts available. The dumping margin for the “All Others” category in the instant case, 15.42 percent, exceeds the 15 percent threshold necessary to impute knowledge of dumping. Therefore, we find there is a reasonable basis to impute importers knowledge that companies covered by the “All Others” rate were dumping

subject merchandise in the United States during the POI. Thus we find that the importer knowledge criterion, as set forth in section 735(a)(3)(A)(ii) of the Act, has been met for the “All Others” companies.

In determining whether an importer knew or should have known that there was likely to be material injury caused by reason of dumped imports, the Department normally will look to the preliminary injury determination of the ITC. If the ITC finds a reasonable indication of present material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that material injury is likely by reason of such imports. See Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon Steel Plate from the People’s Republic of China, 62 FR 61964 (Nov. 20, 1997). In the present case, the ITC preliminarily determination found reasonable indication that an industry in the United States is materially injured by imports of certain orange juice from Brazil. See Certain Orange Juice from Brazil, Investigation No. 731-TA-1089 (Preliminary), 70 FR 20595 (Apr. 20, 2005). Based on the ITC’s preliminary determination of injury, and the final antidumping margins for Cutrale, Montecitrus, and the companies covered by the “All Others” rate, the Department finds that there is a reasonable basis to conclude that the importer knew or should have known that there was likely to be injurious dumping of subject merchandise from them.

In determining whether there are “massive imports” over a “relatively short period,” pursuant to section 735(a)(3)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the base period) to a comparable period of at least three months following the filing of the petition (*i.e.*, the comparison period). It is the Department’s normal practice to examine the longest period for which information is available up to the date of the preliminary determination. See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20954 (Apr. 16, 2004), and accompanying Issues and Decision Memorandum at Comment 3. Accordingly, in determining whether imports of subject merchandise have been massive, we have based our analysis on shipment data for comparable six-month periods preceding and following the filing of the petition.<sup>11</sup>

In determining whether imports for Cutrale were massive under 19 CFR 351.206(h), we note that we were unable to verify Cutrale’s company-specific data. See the CPI Sales Verification Report at pages 15 and 16. Section 776(a)(2) of the Act provides that, if an interested party: (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. In the instant investigation, because Cutrale submitted information that could not be verified, the

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<sup>11</sup> Contrary to the petitioners’ assertion, we note that Cutrale only submitted six months of critical circumstances data at the request of the Department.

Department finds that, pursuant to section 776(a)(2)(D), it is appropriate to use facts available in reaching our final determination regarding critical circumstances for Cutrale.

In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. See, e.g., Notice of Final Determination of Sales of Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (Aug. 30, 2002). To examine whether the respondent cooperated by acting to the best of its ability under section 776(b) of the Act, the Department considers, inter alia, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 65 FR 5554, 5567 (Feb. 4, 2000). In the instant investigation, by providing import data that could not be verified, Cutrale did not act to the best of its ability to comply with a request for information. Consequently, we find that an adverse inference is warranted in making a determination of massive imports for Cutrale.

As AFA, we have relied upon Cutrale's reported data for our massive analysis in the final determination because this data shows that the volume of imports increased by more than 15 percent from January to June 2005 when compared to the import volume in the base period. As a consequence, we find that Cutrale's imports were massive in accordance with section 735(a)(3)(B) of the Act. See the January 6, 2006, memorandum to Stephen Claeys, Deputy Assistant Secretary, from Irene Darzenta, Acting Director, entitled, "Antidumping Duty Investigation of Certain Orange Juice from Brazil - Partial Affirmative Final Determination of Critical Circumstances"(Final Critical Circumstances Memo).

Regarding Montecitrus, we note that its withdrawal from this investigation precluded the Department from soliciting company-specific import data. Thus, we have based our determination of whether imports for Montecitrus were massive on AFA and find that imports for Montecitrus were massive in accordance with section 735(a)(3)(B) of the Act.

In determining whether imports for the companies subject to the "All Others" rate were massive, we examined USITC dataweb data for a six-month period (i.e., January to June 2005) adjusted to exclude Cutrale's and Fischer's company-specific data for the same period. Because the volume of imports increased by more than 15 percent from January to June 2005 when compared to the import volume in the base period, we find that imports for the companies subject to the "All Others" rate were massive in accordance with section 735(a)(3)(B) of the Act.

In making our critical circumstances determination, we also considered the impact of seasonality on imports of certain orange juice. We noted in our preliminary affirmative determination of critical circumstances that imports of certain orange juice are not subject to seasonal trends. See the August 16, 2005, memorandum from Louis Apple to Barbara E. Tillman entitled, "Antidumping Duty Investigation of Certain Orange Juice from Brazil - Affirmative Preliminary

Determination of Critical Circumstances.” Because no interested parties have raised issues of seasonality subsequent to our preliminary determination, we have not revisited our analysis with regard to this issue. Consequently, we find that any surge in U.S. imports of certain orange juice cannot be explained by seasonal trends.

Regarding the petitioners’ argument that Fischer may have failed to report certain imports in its submission regarding critical circumstances, we note that there is no information on the record to support such a conclusion. To the contrary, we note that we verified the accuracy of Fischer’s import data and we are satisfied with its completeness. Therefore, we find that the petitioners’ argument is based solely on speculation and as such we have accorded it no weight. Nonetheless, we note that a finding of massive imports for Fischer is moot in this case because it does not meet the criteria set forth under section 735(a)(3)(A) of the Act.

Consequently, for the final determination we continue to find that critical circumstances exist for imports of certain orange juice from Brazil for Cutrale, Montecitrus, and the companies covered by the “All Others” rate. However, we find that critical circumstances do not exist for imports of certain orange juice from Brazil for Fischer.

Comment 5: Refunds of U.S. Customs Duties

In their questionnaire responses, both Cutrale and Fischer reported receiving duty refunds as part of a U.S. "substitution" duty drawback program. We disallowed the respondents’ claims for an adjustment to U.S. price under this program in the preliminary determination because we found that the companies provided an insufficient link between the amount of U.S. duties paid and the duty drawback received. However, after the preliminary determination, we permitted the respondents to provide supplemental data on this topic, and we indicated that we would reconsider this issue in our final determination.

In their case briefs, both respondents argue that the Department should adjust U.S. price by the amount of the duty refunds reported in their sales listings.<sup>12</sup> According to the respondents, it is the Department’s longstanding practice to make certain adjustments to CEP to ensure that the U.S. price provides an accurate basis to calculate a dumping margin. As support for this argument, Fischer cites Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (Jan. 26, 2005), and accompanying Issues and Decision Memorandum at Comment 1. Fischer contends that these duty refunds are analogous to the reimbursement of U.S. duties by a U.S. customer. See Comment 14, below. Further, Fischer contends that its duty refund adjustment is proper so long as it can be tied to a particular U.S. sale. Fischer notes that the Department verified that the refunds were linked to specific transactions reported in the U.S. sales listing, and thus the Department should allow these refunds for purposes of the final determination.

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<sup>12</sup> Specifically, Cutrale argues that the Department should accept its refunds actually received during the POI, rather than those related to POI sales but applied for at a later date.

Cutrale contends that there is no dispute that its reported duty refunds relate to imports of Brazilian FCOJM and NFC, and thus they are a legitimate offset to the U.S. duties paid by Cutrale's affiliated importer CPI during the POI. Cutrale asserts that CPI considers duty drawback an essential part of its business and pricing strategy in the U.S. market, and, but for its Brazilian juice imports, CPI could not participate in the duty drawback program. According to Cutrale, by exporting a certain amount of juice, CPI knows what duty refund to expect, thereby reducing the total amount of the U.S. duties it pays on merchandise during each fiscal year.

Cutrale contends that the Department has the legal authority to grant its request. Specifically, Cutrale cites section 772(c)(2)(A) of the Act which states that CEP will be reduced by the amount of U.S. import duties incurred in bringing the subject merchandise to the United States. According to Cutrale, the Act neither: 1) stipulates that the U.S. duties must bear a direct relationship to a particular sale; nor 2) requires that Cutrale tie each duty-paid sale to the specific refund received from CBP.

The petitioners maintain that the Department should continue to deny the respondents' claimed duty drawback adjustment for the purposes of the final determination. The petitioners contend that there is no basis in the statute, the Department's regulations, or the Department's practice to grant an adjustment for U.S. duty drawback. According to the petitioners, the only duty drawback adjustment authorized by the statute is an adjustment for drawback received from the home country upon exportation of the subject merchandise to the United States. See section 772(c)(1)(B) of the Act. However, the petitioners note that Brazil does not have a duty drawback program in place for certain orange juice and neither of the respondents have claimed a duty drawback adjustment pursuant to section 772(c)(1)(B) of the Act.

Indeed, the petitioners note that the U.S. duty drawback program at issue has existed since 1789 and the provision for substitution manufacturing drawback has been in place since 1930; however, the petitioners point out that the antidumping statute neither: 1) explicitly includes a provision for a U.S. duty drawback adjustment; nor 2) has been interpreted to include one (*i.e.*, the Department has never made an adjustment for U.S. duty drawback). The petitioners state that the duty drawback adjustments reported by the respondents relate to U.S. duty drawback under CBP's regulations and, according to the petitioners, the Department has found that the treatment of duty drawback under CBP regulations is irrelevant to the administration of section 772(c)(1)(B) of the Act. As support for this assertion, the petitioners cite Circular Welded Carbon Steel Pipes and Tubes From Taiwan; Final Results of Administrative Review of Antidumping Duty Order, 51 FR 43946, 43947 (Dec. 5, 1986) (Pipes and Tubes from Taiwan).

Regarding the provision in the Act governing U.S. import duties, the petitioners contend that this provision clearly refers to U.S. import duties paid at the time merchandise is imported, without any provision for adjustments. According to the petitioners, the Act is concerned with the price paid by the unaffiliated U.S. customer for subject merchandise and any direct adjustments to the price in that transaction. The petitioners allege that a U.S. duty drawback claim based on future exports from the United States of substitute merchandise is irrelevant to both the Act and the calculation of the dumping margin. The petitioners point out that, while Fischer claims that the

U.S. duty drawback it receives is linked to a sale of subject merchandise, in fact the duty refund received is linked to the exportation of substitute merchandise produced in the United States.

The petitioners also contend that the respondents' claimed U.S. duty drawback adjustment goes against the purpose of the Act. According to the petitioners, the Act allows for certain adjustments to U.S. price, including an adjustment for normal U.S. import duties, in order to ensure a fair comparison with NV. Thus, the petitioners note that movement expenses incurred when subject merchandise is shipped to the United States are properly deducted from the U.S. price because such expenses are not incurred on sales in the home market. However, the petitioners contend that making an adjustment for U.S. duty drawback goes against the logic of the statute for the following reasons: 1) the refund amounts received by the respondents are attributable to exports of U.S.-produced merchandise, which can occur years after the import of Brazilian merchandise on which duty was paid; and 2) there is no evidence that the refunds had any influence on the price actually paid by the unaffiliated U.S. customer for the subject merchandise.

According to the petitioners, Cutrale appears to have conceded that it cannot link drawback received to the pricing of individual sales, given that it argued that the Act does not require it to tie "each duty-paid sale with each refund." Similarly, the petitioners contend that there is a lack of evidence linking Fischer's U.S. duty refunds to the price it charges, notwithstanding Fischer's claimed link between its U.S. sales and the U.S. duty drawback amounts it receives from CBP. The petitioners argue that the Department can only make a price adjustment for U.S. duty drawback if the adjustment is both: 1) reflected in the purchaser's net outlay; and 2) reasonably attributable to the subject merchandise, consistent with 19 CFR 351.102(b) and 401(c). According to the petitioners, the respondents' claimed U.S. duty drawback adjustments fail on both counts as they have no effect on the price charged for subject merchandise and are attributable to the exportation of U.S.-produced orange juice, not the importation of subject merchandise.

According to the petitioners, the authority to grant U.S. duty drawback lies with CBP and is neither automatic nor immediate, but based on the approval of an application filed with CBP. The petitioners also note that CBP may not pay a claim for U.S. duty drawback until many years after the importation of subject merchandise. In addition, the petitioners claim that U.S. duty drawback payments from CBP may be booked as income by the respondent at the time of receipt, although the underlying drawback entry may not be liquidated by CBP until a year or more after this payment is received. According to the petitioners, until the liquidation of the drawback entry takes place, there is not even a final payment of duty drawback to use as an offset against the duty paid on the import of subject merchandise, if such an offset were even permissible under U.S. antidumping law.

Finally, the petitioners note that Cutrale is claiming a U.S. duty drawback adjustment when it has not yet received refunds related to POI sales from CBP. In fact, according to the petitioners, Cutrale is claiming U.S. duty drawback received during the POI related to sales made prior to the POI. The petitioners insist that the Department cannot make an adjustment for U.S. duty

drawback based solely on the speculation that a respondent will receive a refund from CBP at some point in the future, nor can it even consider such an adjustment absent evidence that the drawback received affected the price paid by purchasers of the subject merchandise. Thus, the petitioners contend that the Department should continue to deny the respondents' claimed U.S. duty drawback adjustment for the final determination.

Department's Position:

As noted above, in their questionnaire responses, both Cutrale and Fischer reported receiving duty refunds as part of a U.S. "substitution" duty drawback program. This program allows U.S. importers to claim reimbursement of 99 percent of the U.S. duties paid to CBP on imported merchandise when comparable domestic merchandise is exported from the United States. Each company claimed these refunds under different provisions of the U.S. duty drawback law. Fischer claimed these refunds under 19 USC 1313(b), which requires the company to perform a manufacturing process on the orange juice entering the United States (*i.e.*, the addition of oils and essences) in order to later claim reimbursement. Cutrale claimed its refunds under 19 USC 1313(j)(2), which does not require any manufacturing for the company to later claim reimbursement. Although we disallowed the adjustment for U.S. duty drawback claimed by the two respondents in the preliminary determination, we permitted the respondents to provide supplemental data on this topic, and we indicated that we would reconsider this issue in our final determination.

At verification, we examined the refunds reported by each respondent. We found that Fischer's reported refunds were directly linked to its sales of subject merchandise during the POI, while Cutrale's were either: 1) linked to sales made prior to the POI; or 2) claimed on POI sales but not yet granted by CBP. See the October 25, 2005, memorandum from Elizabeth Eastwood and Jill Pollack to Louis Apple entitled, "Verification of the Sales Questionnaire Responses of Citrusuco North America, Inc., in the Antidumping Duty Investigation of Certain Orange Juice from Brazil" (CNA Sales Verification Report) at pages 18 and 19. See also the October 18, 2005, memorandum from Shawn Thompson and Jill Pollack to Louis Apple entitled, "Verification of the Sales Responses of Citrus Products Inc. in the Antidumping Duty Investigation on Certain Orange Juice from Brazil" (CPI Sales Verification Report) at pages 28 and 29.

After reviewing the information on the record of this proceeding, we have reconsidered our treatment of the amounts of refunded customs duties reported by both respondents. Consequently, for the final determination, we have offset the U.S. customs duties paid by both Cutrale and Fischer by the U.S. duty refunds reported by each company, adjusted as noted below.

As a threshold matter, we disagree with the petitioners that the Act limits adjustments for duty drawback to amounts contemplated under section 772(c)(1)(B) of the Act. While it is true that this section frames drawback in the context of home market export programs, this section of the Act does not apply here. Rather, the relevant section is section 772(c)(2)(A) of the Act, which states that the price used to establish CEP shall be

(2) reduced by –

(A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States....

The Department has traditionally interpreted this provision as signifying that it must deduct from the U.S. starting price all movement expenses incurred by the respondent which are incident to importing subject merchandise into the United States. Although the issue of whether to offset U.S. customs duties by the amount of duties refunded under U.S. duty drawback law has not been raised in previous cases, we find no bar to granting such an offset in this case.

In its simplest terms, the question before the Department is how to determine the amount of “United States import duties” to be deducted. After carefully analyzing this issue, we have concluded that the statute’s reference to U.S. import duties does not preclude consideration of refunds of U.S. import duties paid on subject merchandise and to encompass the net duty experience of the respondents, rather than the gross amount of duties paid to CBP. Thus, a deduction for net import duties in this case is consistent with the statute’s requirement to reduce U.S. price by the movement expenses included in such price. We find that this interpretation results in a fair comparison to NV (despite the petitioners’ assertion to the contrary) because it results in the calculation of the ex-factory price for CEP based on the respondents’ actual U.S. customs duty cost experience for importations of subject merchandise.

We disagree with the petitioners that the duty refunds in question must be linked to specific U.S. sales transactions in order to be considered as legitimate offsets to POI customs duty expenses. It is the nature of duty drawback programs in general that drawback granted under these programs could be associated with any like amount of duties paid upon importation. While it is true that there is no necessary correspondence between drawback granted on exports and those paid on imports, it would be unreasonable to conclude from this fact that substitution drawback programs do not impact a company’s net duty costs. Given that companies have up to three years from the date of the importation of subject merchandise to claim such refunds, it would similarly be unreasonable to require these companies not only to match exports to specific import transactions during the POI but also to receive payment from CBP by this time. Because of this long lag time between the importation of subject merchandise and the corresponding U.S. duty drawback claim, we find that offsetting the respondents’ reported duties by U.S. duty refunds received during the POI more accurately reflects a company’s actual net duty expenses.

We note, however, that Cutrale did not separately report its U.S. duty refunds, but rather: 1) offset the duties it paid during the POI with the U.S. duty refunds it received during the same period; and 2) allocated the resulting total net U.S. duty amount over all U.S. sales, including sales of non-subject merchandise. Because: 1) the duty refunds received related only to exports

of FCOJM<sup>13</sup>; and 2) Cutrale's chosen methodology dilutes its overall U.S. duty expenses by applying refunds to non-subject merchandise, we recalculated Cutrale's per-unit net U.S. duties by allocating them over only POI sales of FCOJM. We then applied this net amount only to sales of FCOJM. Thus, we have relied on Cutrale's reported gross duty amounts for sales of NFC in our final margin calculations.

In contrast, Fischer reported duty refunds claimed and received for specific importations of subject merchandise made during the POI, rather than all refunds received during the POI. Because we do not have the information on the record to recalculate the duty offset for Fischer based on total refunds received during the POI over total POI importations of FCOJM, we have accepted the per-unit U.S. duty refunds as submitted for purposes of the final determination. See section 782(e) of the Act. We note that, in the event that the Department issues an antidumping duty order in this proceeding, we intend to require respondents in subsequent segments to report U.S. duty refunds based on the amount of those refunds received during the review period.

Regarding the petitioners' contention that the Department can only make an adjustment for U.S. duty drawback if such an adjustment is reflected in the purchaser's net outlay, we disagree. The only portion of our regulations with this requirement is 19 CFR 351.102(b) (i.e., the regulation which defines the term "price adjustment"). As explained in the preamble to the Department's regulations, price adjustments are not "expenses" as the Department usually uses that term, but rather changes that the Department must take into account in identifying the actual starting price (either as additions or deductions). See Preamble, 62 FR at 27300. In contrast, the provision of the Act governing U.S. import duties is section 772(c)(2)(A). As noted above, this provision merely requires that the Department reduce U.S. price by all movement costs which are "included in" the starting price.

In addition, we disagree with the petitioners' argument that as: 1) the U.S. substitution drawback program has existed for more than seven decades; and 2) the Department has never granted an adjustment to U.S. price under this program, it would be inappropriate to do so here. As noted above, this issue is one of first impression for the Department and thus the lack of prior precedent is not determinative. Moreover, we find that the petitioners' citation to Pipes and Tubes from Taiwan is not on point because in that case, the respondent reported duty drawback received from the country of exportation (i.e., Taiwan) and it merely speculated that, if it were a U.S. company, it would have qualified for a duty refund under the U.S. duty drawback law. Thus, in Pipes and Tubes from Taiwan, the Department found that the treatment of U.S. duty drawback under U.S. Customs regulations was irrelevant because the duty drawback in question was Taiwanese (and thus it was interpreting a separate provision of the Act).

Regarding the petitioners' argument that it would be inappropriate to accept the U.S. duty refunds claimed by the respondents because they are earned upon the exportation of substitute

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<sup>13</sup> Although Cutrale asserted its case brief that its drawback amounts related to imports of both FCOJM and NFC, there is no evidence of this fact on the record of the case.

merchandise under 19 USC 1313(b) and (j)(2) (and thus they relate to non-subject, rather than subject merchandise), we disagree. As noted above, these are refunds of duties incurred as a direct result of the importation of subject merchandise, and as such we find that they are legitimate offsets to U.S. customs duties paid on such imports. Furthermore, we find the petitioners' concern that the underlying entry to which a U.S. duty refund is tied may not be liquidated for a year or more after a U.S. duty refund payment is received from CBP to be without merit. CBP collects duties on entries of subject merchandise at the time that merchandise enters the United States and it is the Department's longstanding practice to accept such duties as the per-unit U.S. duty expenses for purposes of our margin calculations. It would be illogical for the Department to treat such duties as an expense on U.S. sales though the entry has not been liquidated, but to disallow an offset for refunds of such duties simply because the underlying entry had not yet been liquidated.

Finally, we find that the petitioners' argument regarding Cutrale's duty refunds (*i.e.*, it would be inappropriate to accept amounts which have been claimed but not yet granted by CBP) is not applicable here because we have relied on the amounts received by Cutrale during the POI, as recorded in its duty accounts in its books and records, and not those amounts claimed by Cutrale on POI sales but not yet approved by, or received from, CBP.

Comment 6: Data Changes Arising from the Sales Verifications

The petitioners note that the Department discovered a number of minor discrepancies at the sales verifications of Cutrale and Fischer and their respective affiliates. For a detailed description of the discrepancies noted at verification for Cutrale and its U.S. affiliates and Fischer and its U.S. affiliate, see the petitioners' November 1, 2005, case brief at pages 35 through 38 and 45 through 51, respectively. One of the "discrepancies" cited by the petitioners is certain unreported U.S. sales discovered at the verification of Fischer's U.S. affiliate, CNA. The petitioners request that the Department revise the final margin calculations for both respondents to incorporate the changes resulting from verification, including the unreported sales.

Department's Position:

It is the Department's practice to accept minor corrections to reported data, based on our findings at verification. See, *e.g.*, Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 18. Therefore, we have incorporated most of the changes noted by the petitioners for Cutrale, Fischer, and their respective affiliates in our calculations for the final determination. For a detailed discussion of the changes made to the final calculations for Cutrale and Fischer, see the January 6, 2006, memorandum from Jill Pollack to the file entitled, "Calculations Performed for Sucocitrico Cutrale Ltda. (Cutrale) in the Investigation of Certain Orange Juice from Brazil" and the Fischer Final Calculation Memo.

Regarding the unreported U.S. sales discovered at the verification of CNA, however, we disagree with the petitioners that it is appropriate to include these sales in our final determination. We

note that the only data on the record related to these sales is their quantity and value; therefore, we do not have complete information to use in our final margin analysis. Although the Department is not required to examine all U.S. sales transactions in LTFV investigations, our practice has been to disregard transactions only when they are both unusual and represent a small percentage (i.e., typically less than five percent) of a respondent's total sales. See, e.g., Final Determination of Sales at Less than Fair Value: Pure Magnesium from the Russian Federation, 66 FR 49347 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 10 (where the Department disregarded a small volume of trial sales) (Pure Magnesium from Russia); and Final Determination of Sales at Less Than Fair Value: Certain All Terrain Vehicles from Japan, 54 FR 4864, 4867 (Jan. 31, 1989) (where the Department stated that it would consider excluding sales "when those sales are not representative of the respondent's selling practices in the U.S. market, or where those sales are so small that they would have an insignificant effect on the margin") (ATVs from Japan). In this case, we find that, although the volume of the sales in question is small, there is nothing unusual about the transactions in question.

As Fischer did not provide the Department with the complete information regarding its universe of POI subject sales in a timely manner, we find that it is appropriate to resort to facts otherwise available to account for the unreported sales information. See Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Not Revoke Order in Part: Canned Pineapple Fruit from Thailand, 68 FR 65247 (Nov. 19, 2003), and accompanying Issues and Decision Memorandum at Comment 20b. Fischer's failure to provide this necessary information meets the requirements set forth in Nippon Steel Corp. v. United States, 337 F. 3d 1373 (Fed. Cir. 2003) (Nippon Steel). As stated by the Court of Appeals for the Federal Circuit (CAFC) during its discussion of section 776(a) of the Act in Nippon Steel, "[t]he focus of subsection (a) is respondent's failure to provide information. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information - for any reason - requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination."

In regard to the use of an adverse inference, section 776(b) of the Act states that the Department may use an adverse inference if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. . ." In Nippon Steel, the Court set out two requirements for drawing an adverse inference under section 776(b) of the Act. First, the Department "must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." Nippon Steel, 3337 F. 3d 1382-83. Next, the Department must "make a subjective showing that the respondent . . . has failed to promptly produce the requested information" and that "failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." Id. Because: 1) Fischer had the necessary information within its control and it did not report this information; and 2) it failed to put forth its maximum effort to provide it as

required by the Department's questionnaire, we find that Fischer's failure to respond in this case clearly meets these standards.

Therefore, as adverse facts available, we have applied the highest non-aberrational margin calculated for any U.S. product to the volume of Fischer's unreported U.S. sales, in accordance with our practice. See Static Random Access Memory Semiconductors from Taiwan; Final Results of the Antidumping Duty New Shipper Review, 65 FR 12214 (Mar. 8, 2000), and accompanying Issues and Decision Memorandum at Comment 1. In selecting a facts available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purpose of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of Fischer's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied. In this case, the margin selected was for Fischer's highest volume product.

Comment 7: Treatment of By-Products

In this investigation, both Cutrale and Fischer reduced their reported costs by the revenue earned on certain by-products (*i.e.*, animal feed, pulp wash, oils and essences, etc.). Because Cutrale normally does not include its by-product processing costs in its production costs for FCOJM and NFC, for reporting purposes Cutrale increased its reported costs by the by-product processing costs and then reduced the reported costs by the by-product sales revenue. Likewise, Fischer increased its reported costs by the by-product processing costs and then reduced its reported costs by the value of by-products produced. In the preliminary determination, the Department allowed the by-product revenue offset for both respondents.

The petitioners disagree that the revenue earned on animal feed is an appropriate offset to either respondent's costs because animal feed is not a by-product.<sup>14</sup> According to the petitioners, the Department considers the following factors when determining whether a product is a by-product for purposes of deducting its revenue from the COP: 1) how the company records and allocates costs in the ordinary course of business, in accordance with its home country generally accepted accounting principles (GAAP); 2) the significance of each product relative to the other joint products; 3) whether the product is an unavoidable consequence of producing another product; 4) whether management intentionally controls production of the product; and 5) whether the product requires significant further processing after the split-off point. As support for this assertion, the petitioners cite Notice of Final Determination of Sales at Less than Fair Value: Polyvinyl Alcohol from the People's Republic of China, 68 FR 47538 (Aug. 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2 (PVA from China). The

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<sup>14</sup> Although the petitioners argued in their case brief that all of the products claimed as by-products should be treated as joint products, they revised their argument during the public hearing in this case to focus only on animal feed. See the November 21, 2005, hearing transcript prepared for this investigation at page 11.

petitioners argue that, based on these factors, the respondents' by-product revenue offset for animal feed should be disallowed for the final determination because: 1) the costs and revenues are separately accounted for in both respondents' normal books; 2) the revenue and profit are significant; 3) it requires significant further manufacturing once it is separated from the production of FCOJM and NFC; 4) animal feed is a separate and distinct product from FCOJM and NFC; and 5) management intentionally controls its production.

Regarding the first factor, the petitioners argue that Cutrale and Fischer track and record "by-product" activities separately from FCOJM and NFC in their normal books and records. The petitioners note that in Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 4 (Structural Steel Beams from South Africa), the Department examined three characteristics to determine if a company accounts for a product as a by-product in its financial accounts: 1) whether the activity associated with by-products is only recognized in the general ledger when they are sold; 2) whether the sale transaction is recorded as sales revenue or other income in the income statement; and 3) whether by-product inventories are recorded. The petitioners claim that Cutrale and Fischer's treatment of "by-product" activities do not follow these three characteristics and rather, the production and sales activities of by-products were separately tracked from orange juice activities in the companies' normal books. Specifically, the petitioners argue that Cutrale and Fischer track and record detailed by-product information in the normal course of business, such as production quantity, production cost, and sales revenue in their books prior to sales of this product. The petitioners also assert that Cutrale and Fischer record sales revenue by each product category and maintain product-specific inventory records. Moreover, the petitioners note that Cutrale in its chart of accounts and trial balance separately tracks its "by-product" activities from other product activities (e.g., FCOJM, NFC, etc.).

Regarding the second factor, the petitioners argue that the Department also identifies by-products by their relative insignificant sales value, citing Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246, 72250 (Dec. 31, 1998) (Preserved Mushrooms from India); Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Sebacic Acid From the People's Republic of China, 59 FR 565, 569 (Jan. 5, 1994); and Association Colombiana de Exporadores v. United States, 704 F. Supp. 1114, 1125-26 (CIT 1989) (Association Colombiana). Specifically, the petitioners argue that Cutrale's "by-product" sales revenue is significant compared to the manufacturing costs of orange juice, and the "by-product" profit rate is also significant during the POI. Further, the petitioners assert that the cost of goods sold for Cutrale's animal feed is higher than the cost of goods sold for other fruit juice products. Similarly, the petitioners argue that Fischer's relative sales value of animal feed is also significant when compared to the relative sales value of FCOJM and NFC.

Regarding the third factor, the petitioners argue that while the production of orange juice may be an intentional outcome of the production process, the production of animal feed is not an unavoidable consequence of producing FCOJM and NFC. The petitioners contend that most of

these costs are related to processing costs after the orange juice was extracted because this product requires further processing and energy consumption before it can become a marketable product. Thus, the petitioners maintain that the respondents' production of animal feed is not an unavoidable consequence of producing orange juice.

Regarding the fourth factor, the petitioners contend that the process of producing animal feed is sophisticated and complex. Consequently, it cannot be considered an unavoidable consequence of producing FCOJM and NFC given the the complexity of required further processing.

Regarding the fifth factor, the petitioners argue that it is reasonable to conclude that the respondents' management intentionally controls the production of animal feed considering that it requires significant further processing once separated from the production of orange juice and yields a significant profit rate for the company. For example in the case of Cutrale, the petitioners claim that the percentage of further processing costs after the split-off point for animal feed is higher than the percentage of further processing costs after the split-off point for orange juice, when compared to each product's respective sales value. Thus, the petitioners assert that Cutrale's and Fischer's animal feed production process requires management's full intent and control.

Based on the above analysis, the petitioners maintain that the Department should not allow Cutrale's and Fischer's inclusion of either animal feed costs or revenues in their reported costs for FCOJM and NFC because they are attributable to non-subject merchandise.<sup>15</sup>

Cutralé asserts that the petitioners misinterpret the production process of orange juice and its by-products. Contrary to the petitioners' claims, Cutralé insists that its by-products are not distinct products and their costs are not separately accounted for in the normal course of business. Cutralé points out that its accounting system does not allocate a portion of raw material costs (i.e., oranges) to the cost of producing by-products, and, therefore, the by-product costs do not represent the full cost of producing the by-products. Cutralé notes that the raw material costs are the most significant element of producing orange juice and if its by-products were fully costed to include the raw material costs, the reported by-product costs would be significantly higher. According to Cutralé, the petitioners are essentially suggesting that the Department only reduce the cost of producing orange juice by a fraction of the true cost of generating those by-products. Cutralé argues that the petitioners' proposed methodology would overstate the cost of producing orange juice, as none of the cost of raw materials would be allocated to the by-products.

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<sup>15</sup> Further, the petitioners note that at verification, the Department found that Fischer sold certain by-products to affiliates at prices which were not at arm's length. See the October 19, 2005, memorandum from Heidi K. Schriefer to Neal Halper entitled, "Verification Report on the Cost of Production and Constructed Value Data Submitted by Fischer S.A.- Agroindustria" (Fischer Cost Verification Report) at page 23. Thus, the petitioners contend that Fischer's by-product offset is overstated and, if the Department continues to grant Fischer such an offset for the final determination, it should be reduced to reflect the market price of such by-products.

Cutrale also maintains that the reduction of the cost of subject merchandise by the total by-product revenue earned was the only accurate methodology it could use in calculating the production costs of orange juice. According to Cutrale, its records do not capture the full cost of producing by-products because there was no way to accurately allocate the raw material costs (*i.e.*, orange inputs) to by-products. Thus, Cutrale contends it could not simply reduce its orange juice production costs by the full cost of its by-products. Consequently, in order to calculate the orange juice production costs reported to the Department, Cutrale explains that it included the further processing cost of by-products in the cost of producing orange juice, and then reduced this total cost by the sales revenue earned from by-products. Cutrale asserts that this methodology is consistent with GAAP and the proper treatment of by-products.

Further, Cutrale maintains that, contrary to the petitioners' claims, when the by-products in question are measured against the five factors listed by the petitioners, the facts warrant a by-product treatment for these products.<sup>16</sup> Cutrale asserts the petitioners' argument that its by-product sales revenue is significant is misleading. Cutrale notes that the petitioners compared the revenue received from the sale of by-products to the cost of manufacturing (COM) of certain orange juice for the POI. According to Cutrale, such a comparison is inapposite. Instead, Cutrale asserts that the petitioners' analysis should have compared by-product sales revenue to orange juice sales revenue. In addition, Cutrale states that the petitioners calculated a distorted by-product profit percentage by comparing its by-product revenue to by-product costs which include no raw material costs.

According to Cutrale, the production of orange juice by-products does not require significant further processing, contrary to the petitioners' assertion. Again, Cutrale notes that the petitioners' comparison showing that the cost of further manufacturing by-products is greater than the cost of further manufacturing orange juice is distorted because no raw material costs are included in the cost of by-products. In fact, Cutrale maintains that an examination of the record evidence supports the conclusion that the cost of further processing by-products is not significant when compared to the full cost of producing orange juice. In addition, Cutrale asserts that the production of its by-products is an unavoidable consequence of producing orange juice. According to Cutrale, in order to make orange juice, it has to crush the oranges, extract the juice, and obviously cannot include the peel, the oils, or the pulp in the juice. However, Cutrale notes that the production of these materials is a consequence of crushing and extracting orange juice, and by processing and selling by-products, it is able to recoup some of the cost of producing orange juice. Cutrale argues that the by-products generated from producing orange juice are conceptually no different from by-products such as tar, slag, and scrap that are produced in the production of steel. Cutrale states that without additional processing, these elements are nothing more than waste; however, in further processing these by-products the company can recoup some of its cost of producing the principal product. Cutrale maintains that, in steel cases, the

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<sup>16</sup> Cutrale contends that the petitioners' analysis argues for treating its reported by-products as co-products, which would have to be separately costed in Cutrale's books and records.

Department has always considered such by-product revenue as cost recovery to reduce the cost of making steel. Thus, according to Cutrale, the Department should follow its practice and make the same by-product offset to Cutrale's costs in the instant investigation.

Cutralé and Fischer assert that the Department examined the petitioners' arguments in Frozen Concentrated Orange Juice from Brazil: Final Determination of Sales at Less than Fair Value, 52 FR 8324, 8328-8329 (Mar. 17, 1987) (FCOJ from Brazil Investigation) and found that the products in question (e.g., animal feed, pulp, etc.) were not separate and distinct products from orange juice, but rather by-products.<sup>17</sup> In addition, the respondents note that in FCOJ from Brazil Investigation, the Department calculated the cost of producing orange juice by including all by-product production costs in the cost of orange juice, and then reducing this cost by the revenue received on the sale of by-products. See FCOJ from Brazil Investigation, 52 FR at 8327. Fischer argues that the production process for by-products has not changed since the FCOJ from Brazil Investigation and it followed the Department's past practice and GAAP in its treatment of by-products in the instant investigation. Thus, Fischer maintains that the Department should allow Fischer's by-product revenue offset to its costs for the final determination.

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<sup>17</sup> Cutrale also cites the following reviews of the order on FCOJ from Brazil showing the Department's consistent use of this methodology: Frozen Concentrated Orange Juice From Brazil; Final Results and Termination in Part of Antidumping Duty Administrative Review, 55 FR 47502 (Nov. 14, 1990); Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review, 55 FR 26721 (June 29, 1990); Frozen Concentrated Orange Juice From Brazil; Final Results and Termination in Part of Antidumping Duty Administrative Review; Revocation in Part of the Antidumping Duty Order, 56 FR 52510 (Oct. 21, 1991); Frozen Concentrated Orange Juice From Brazil; Final Results and Termination in Part of Antidumping Duty Administrative Review, 57 FR 12910 (Apr. 14, 1992); Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part, 59 FR 53137 (Oct. 21, 1994); Notice of Final Results of Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice From Brazil, 62 FR 5798 (Feb. 7, 1997); Frozen Concentrated Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review, 62 FR 29328 (May 30, 1997); December 1998 Sunset Reviews: Final Results and Revocations, 64 FR 9473 (Feb. 26, 1999); Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review, 63 FR 26145 (May 12, 1998); Final Results of Expedited Sunset Review: Frozen Concentrated Orange Juice from Brazil, 64 FR 16901 (Apr. 7, 1999); Frozen Concentrated Orange Juice From Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 43650 (Aug. 11, 1999); Frozen Concentrated Orange Juice from Brazil; Amended Final Results of Antidumping Duty Administrative Review, 65 FR 66691 (Nov. 7, 2000); Frozen Concentrated Orange Juice from Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 51008 (Oct. 5, 2001); and Frozen Concentrated Orange Juice From Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 40913 (June 14, 2002).

Department's Position:

Consistent with the preliminary determination, we find that it is appropriate to allow an offset to the reported costs for revenue generated from by-products and include the associated further processing cost of by-products in the reported costs for the final determination. Both respondents use oranges as the primary raw material in the production of FCOJM and NFC and the production process for orange juice begins when fresh oranges are received and crushed. In the crushing process, the juice is gathered into a trough, and the leftover rinds are passed through a separate line for making animal feed. Other products, such as oil, are separated and pass to their own collection facilities.

The National Association of Accountants (NAA) defines a joint product as two or more products so related that one cannot be produced without producing the other(s), each having relatively substantial value and produced simultaneously by the same process up to a split-off point. The NAA defines a by-product as a secondary product recovered in the course of manufacturing a primary product, whose total sales value is relatively minor in comparison with the sales value of the primary product. Similarly, the products in a jointly-produced group often vary in importance. Products of greater importance are called major products and products of minor importance are called by-products. When two or more major products appear in the same group, they are called co-products. The term "joint product" includes major product, co-product, and by-product because all are produced jointly. See Management Accountants' Handbook, Fourth Edition; Keller, Bulloch and Shultis at 11.6.

As noted by the petitioners, the Department generally looks at several factors in order to determine whether joint products are to be considered co-products or by-products. See Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review, 61 FR 8239, 8241-8242 (Mar. 4, 1996) (Elemental Sulphur From Canada); Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 43949 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (Pure Magnesium From Israel); and Structural Steel Beams from South Africa at Comment 4. Among these factors are the following: 1) how the company records and allocates costs in the ordinary course of business, in accordance with its home country GAAP; 2) the significance of each product relative to the other joint products; 3) whether the product is an unavoidable consequence of producing another product; 4) whether management intentionally controls production of the product; and, 5) whether the product requires significant further processing after the split-off point. We emphasize that no single factor is dispositive in our determination. Rather, we consider each factor in light of all of the facts and circumstances surrounding each case.

In this case, we find that Cutrale and Fischer properly classified joint products such as animal feed, oil, essence, and pulp wash as by-products based on our analysis of the factors outlined above. The first factor is how the company records and allocates costs in the ordinary course of business to joint products. As stated in the October 19, 2005, memorandum from Oh Ji to Neal Halper entitled, "Verification Report on the Cost of Production and Constructed Value Data

Submitted by Sucocitrice Cutrale Ltda.” (Cutrale Cost Verification Report) at page 11, the costs maintained in Cutrale’s books and records for by-products do not include an allocated portion of the raw material costs (i.e., oranges). Thus, while Cutrale tracks and records the production and sales activity (i.e., quantity and value) for by-products, the recorded by-product costs only represent the separable costs (i.e., further processing of the individual by-product after the split-off point). In contrast, Cutrale’s production cost of orange juice represents the fully absorbed costs including all of the raw material costs. Fischer tracks the production quantity of its by-products, but it does not track, assign, or allocate production costs to these by-products. See the Fischer Cost Verification Report at page 11 and Fischer’s August 4, 2005, section D response at page 11. Rather, each month, Fischer values its generated by-products based on their average monthly net sales value. However, unlike its by-product costs, Fischer records, tracks, and allocates its detailed production costs to orange juice. Thus, we note that Cutrale and Fischer use different methods to track and account for animal feed, pulp wash, oils, etc. compared to the treatment of orange juice products. Because differences in the relative values of joint products will influence the decision as to how much time and effort will be spent measuring them, we consider Cutrale’s and Fischer’s treatment as an indication of the relative insignificance that is attributed to products other than orange juice by both companies.

We disagree with the petitioners’ assertion that Structural Steel Beams from South Africa supports the conclusion that the respondents in the instant investigation are not accounting for animal feed as by-products in their normal books and records. Specifically, in Structural Steel Beams from South Africa, the Department clearly stated that the three specific characteristics discussed in that case were related to one of four options which a company could use to account for by-products in a company’s financial accounts. Alternatively, a company could also use one of the other three options, which are: 1) the activities associated with by-products are recognized in the general ledger when they are generated, the sales activities associated with by-products are recorded as a reduction of costs, and by-product inventories are recorded; 2) the activities associated with by-products are recognized in the general ledger when they are generated, the sales activities associated with by-products are recorded as sales revenue or other income items, and by-product inventories are recorded; and 3) the activities associated with by-products are recognized in the general ledger when they are sold, the activities associated with by-products are recorded as a reduction of costs, and by-product inventories are not recorded. See Cost Accounting: A Managerial Emphasis, Charles T. Horngren, Srikant M. Datar, and George Foster, p. 584-585 (1994). Because there are several acceptable options for the accounting treatment of by-products, the petitioners’ assertion that the products are co-products because neither respondent accounted for the by-products under only one of the possible options is misleading. In fact, we note that Cutrale’s and Fischer’s normal treatment of their by-products (e.g., animal feed, oil, essence, and pulp wash, etc.) is consistent with the three characteristics discussed in option two, above.

The second factor is the significance of each product relative to the other joint products. In assessing the significance of each product generated from a joint process, in past cases we have looked at the relative value of each of the end products processed from the joint process stream. See Elemental Sulphur From Canada, 61 FR at 8241-8242. However, while the relative value of

the end products is important for financial reporting purposes, the relative values of the joint products at the split-off point is more meaningful for assessing the significance of each product as output from the split-off point. Therefore, for purposes of this case, we analyzed the relative value of each product generated from the joint process both ways (i.e., the relative values of the end-products and the relative values of the products generated from the joint process at the split-off point). In order to convert the values of the end-products to their relative values at the split-off point, we reduced each of the sales values by the cost of further processing for each product after the split-off point. In short, we used the net realizable value method to determine the value at split-off. Based on our analysis of the relative product values at both the split-off point and the end point after further processing (i.e., finished goods), the value of these by-products are not significant relative to the value of orange juice. See the Cutrale Cost Verification Report at page 27, and the Fischer Cost Verification Report at page 24.

Further, we find that the petitioners' analysis of this factor derived from the respondents' cost data is distortive because: 1) the basis of the sales value comparisons in the analysis is improper; and 2) for Cutrale, the by-product profit rate calculation is not based on the fully allocated by-product costs. Specifically, regarding item one for Cutrale, we note that the petitioners compared the sales value of by-products to the COM of orange juice and the further processing costs of by-products to the cost of goods sold of other fruit juices, rather than comparing the sales value between by-products and orange juice. Similarly, for Fischer, the petitioners compared the costs of goods sold between by-products and orange juice, rather than comparing the sales values between by-products and orange juice.

The third factor in determining whether joint products should be considered co-products or by-products is whether the product is an unavoidable consequence of producing another product. According to the petitioners, in this case although orange juice is the intentional outcome of the production process, the production of by-products is not unavoidable due to their required further processing. We note that, while the further processing of these products is not an unavoidable consequence of the production process, the resulting additional materials from crushing oranges (i.e., peel, oil, pulp, etc.) is. In any event, in the instant case we do not believe that determining whether or not a product is an unavoidable consequence of the production process supports either a by-product or co-product treatment.

The fourth factor in determining whether joint products should be considered co-products or by-products is whether management intentionally controls their production. This factor is similar to the third factor, in that it recognizes that management may be taking steps to minimize or maximize the output quantities of by-products. While the respondents derive a portion of their revenues from sales of these by-products, we found no evidence that the respondents' management intentionally controlled output quantities of by-products. Rather, we found that the output quantities of these by-products were closely correlated with the quantity of oranges consumed in the orange juice production process. For example, we observed at Cutrale that, as the consumption quantity of oranges increased, the production quantity of by-products also increased, and vice versa. See the Cutrale Cost Verification Report at Verification Exhibits 10

and 12. As such, this factor alone neither supports nor confirms a finding that the animal feed, oil, pulp wash, etc. are by-products.

With respect to the fifth factor, whether the by-products (*i.e.*, animal feed, pulp wash, oil, etc.) require significant further processing after the split-off point, we consider this factor to have conflicting implications. For financial reporting purposes, this factor is relevant in that if there is significant further processing required, presumably the end product's value will increase to the point where its value may be significant in relation to the other end products produced. On the other hand, however, the fact that a product requires significant further processing after the split-off point may indicate that the value of the output product is minimal, with the bulk of its value being added by the further processing. In this instance, it would appear unreasonable to allocate joint costs to the output product which is basically worthless at the split-off point, but somewhat valuable after significant further processing. Regardless, we found that none of the products resulting from the joint process required much additional processing after the split-off point when compared to the total costs incurred by the company. See the Cutrale Cost Verification Report at page 28 and the January 6, 2006, memorandum from Heidi K. Schriefer to Neal Halper entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Fischer S/A - Agroindustria" (Fischer Final COP/CV Calc Memo). In addition, as noted above in our analysis of factor two, the relative product values of the by-products at both the split-off point and the end point after further processing are not significant relative to the value of orange juice.

Finally, we disagree with the petitioners' argument that because certain by-products required significant further processing, even compared to the orange juice further processing, that they should be considered co-products. As noted above, this factor is generally only relevant if there is presumably such significant value added after the split-off point that the end product value will increase to the point that its value is significant in relation to the other end products produced. However, as noted above, the relative product values of the by-products at the end point after further processing are not significant relative to the value of orange juice.

Regarding the petitioners' argument on the valuation of the by-product offset, we have determined that the Department should make an adjustment for the by-product sales transactions between Fischer and its affiliates because we found at verification that these sales were not arm's-length transactions. See the Fischer Cost Verification Report at page 23. Thus, for the final determination, we adjusted Fischer's affiliated by-product sales transactions to reflect the market price for such transactions. For the details of this calculation, see the Fischer Final COP/CV Calc Memo.

Consequently, based on our analysis of the five factors above, we consider animal feed, oil, essence, and pulp wash, by-products of producing orange juice and thus, we allowed the respondents' by-product revenue offset (except as noted in Comment 22, below, and adjusted as described for Fischer, above) in our calculations for the final determination.

## II. Company-Specific Issues

### Comment 8: *Trading Gains and Losses on Cutrale's Futures Contracts*

During the POI, Cutrale's U.S. affiliate CPI made U.S. sales of subject merchandise on the futures market. Specifically, Cutrale reported two types of sales involving futures contracts: 1) sales made to the New York Board of Trade (NYBOT); and 2) "exchange for physicals" (EFP) sales. Sales to the NYBOT are "standard" futures transactions, where the sale of the futures contract is to the NYBOT and merchandise is delivered to the bearer of the NYBOT's delivery certificate. Sales to EFP customers are similar, but in an EFP sale, Cutrale and its customer agree to exchange futures contracts at a price which is negotiated by the two parties.

In its questionnaire response, Cutrale stated that it intended to deliver merchandise pursuant to each futures contract taken out during the POI. However, occasionally Cutrale "rolled over" certain contracts to a subsequent delivery month, which entailed cancelling out the short position taken on its sell contracts with a corresponding long position on buy contracts. Cutrale then took out additional sell contracts for delivery in the desired month. Each time Cutrale rolled over a futures contract, it incurred a gain or loss on the transaction. Cutrale also incurred gains or losses on futures transactions involving products which were "noticed" for delivery during the POI. Under this latter type of transaction, Cutrale did not roll over its futures contracts but rather notified the NYBOT that it intended to perform against them by delivering merchandise to either the NYBOT's certificate holder or an EFP customer.

Sales involving futures contracts comprise a significant portion of Cutrale's reported U.S. sales. In the preliminary determination, we treated non-rollover gains and losses as a direct adjustment to the reported gross unit price and rollover gains and losses as a part of indirect selling expenses. For a further discussion, see Comment 9, below.

Cutrale agrees with the Department's treatment of gains and losses on contracts noticed during the POI, but disagrees with its classification of rollover gains and losses as indirect selling expenses. Cutrale contends that all of its reported gains and losses are tied to specific sales, including those on rollovers, and the Department confirmed this fact at verification. Specifically, Cutrale maintains that the Department verified that: 1) each time CPI takes a position in the futures market, it links all acquired futures contracts to a particular customer to cover forecasted deliveries to that customer; and 2) should CPI roll over some of its futures contracts for a particular month due to changing customer demands or inventory considerations, it carries forward the resulting gains and losses in its accounting system and ultimately applies them to the delivery of merchandise. See the CPI Verification Report at pages 7 through 9. According to Cutrale, although the petitioners assert in their case brief that Cutrale is unable to tie futures gains and losses to particular sales (see below), they fail to provide any evidence that this is true. Indeed, Cutrale maintains that a simple review of its sales process for EFP transactions disproves the petitioners' argument. Similarly, Cutrale contends that the petitioners misrepresented its accounting practices with regard to futures contracts (see below) because the petitioners confused certain terminology set forth in the CPI sales verification report (i.e., the report states

“commodity hedging sales account” rather than “commodity hedging account”); thus, although the petitioners argue that CPI’s gains and losses were not transferred into a sales account, the record evidence demonstrates that Cutrale did exactly that.

Cutrale argues that, as a business practice, it considers the futures gain or loss to be inextricably linked with the price of the sale. Thus, according to Cutrale, any futures gain or loss incurred by CPI or its customer on EFP transactions bears direct impact on the ultimate price of the orange juice. Consequently, Cutrale argues that the petitioners’ assertion that the futures gain or loss in EFP sales is irrelevant to the price of the subject merchandise is incorrect and should be disregarded.

Cutrale recognizes that the Department is reluctant to apply futures gains incurred during speculative activity to the price of the product. However, Cutrale notes that this concern is not present here because Cutrale undertakes its futures activity as a means of hedging the price for subject merchandise, rather than as speculation in the futures market. Cutrale claims that the Department’s verification report bears out the truth of this assertion because it confirms that CPI is required by U.S. GAAP to link gains and losses on futures activity with specific sales in order to qualify as a hedger. See the CPI Sales Verification Report at page 10. Cutrale maintains that CPI’s status as a hedger affords it certain tax advantages, and its current record-keeping practices in this regard are sufficient to satisfy the Internal Revenue Service (IRS). According to Cutrale, it would be inconsistent and unfair for the Department not to view the links between futures gains and losses as sufficient, given that the IRS does.

In addition, Cutrale notes that all of CPI’s futures transactions meet the requirements of financial accounting standard (FAS) 133. According to Cutrale, FAS 133 requires that CPI: 1) designate each futures transaction to a forecast sale of product; 2) show that each contract was taken out with the intention of actually delivering product under the contract; and 3) tie that contract to the delivery of product. Cutrale maintains that the requirements of GAAP regarding the links between futures positions and deliveries are similar to the Department’s requirements for determining whether price adjustments are tied to sales of subject merchandise under 19 CFR 351.102(b) and bear a direct relationship to the particular sale in question under 19 CFR 351.401(c). Further, Cutrale asserts that FAS 133 prevents Cutrale from recognizing any of the gains or losses on its futures transactions as revenue until CPI physically ships the merchandise. According to Cutrale, its use of FCOJ futures contracts is completely different from speculative futures trading, where gains and losses incurred as a result of trading futures are recorded on a company’s books as revenue as the trading occurs.

Cutrale maintains that granting an adjustment to U.S. price for futures gains and losses is consistent with Department practice, as evidenced by the Department’s decision in Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (Apr. 2, 2002) (Softwood Lumber Final Determination), and accompanying Issues and Decision Memorandum at Comment 21. According to Cutrale, in Softwood Lumber Final Determination, the issues of whether the Department would make a price adjustment for a respondent’s gains on futures contracts rested on whether the contracts

resulted in the sale of subject merchandise. Cutrale contends that the respondent in that case incurred two types of futures contract-related gains: 1) profits on sales of futures contracts that resulted in the shipment of subject merchandise; and 2) profits on sales of futures contracts where no merchandise was delivered. Cutrale notes that in that case the Department included profits on sales that occurred during the POI as a result of futures contracts in the respondent's sales listing and excluded profits on futures contracts that did not. See Softwood Lumber Final Determination, 67 FR at 15542.

According to Cutrale, the Department's decision in Softwood Lumber Final Determination has neither been revised in subsequent administrative reviews nor challenged during the North American Free Trade Agreement (NAFTA) panel appeals of that case. Cutrale contends that the only related issue addressed in NAFTA appeals is the treatment of investment gains which did not result in sales of subject merchandise. Cutrale distinguishes such gains from its own by noting that the respondent in Softwood Lumber Final Determination booked its gains immediately as sales revenue and could not trace any of these profits to a sale of subject merchandise. Cutrale also asserts that, in Softwood Lumber Final Determination, the respondent requested that the Department allocate its futures gains across all U.S. sales, rather than tying them to particular sales. Thus, Cutrale asserts that the respondent's situation in Softwood Lumber Final Determination is not analogous to Cutrale's in the instant investigation.

Cutralo contends that adjusting U.S. price by the amount of futures gains and losses is less an adjustment to U.S. price than a recognition of what both the IRS and Cutrale regard as the true gross unit price of each sale. Cutrale disagrees with the petitioners' argument (see below) that the Department is precluded from viewing these gains and losses in this manner, given that they do not affect the net outlay of the customer. Cutrale maintains that examining U.S. price from the purchaser's perspective is contrary to the Department's longstanding practice, which is to calculate U.S. price based on what the seller received for the product. To illustrate its argument, Cutrale notes that the Department calculates imputed credit expenses based on the seller's short-term interest rate, even though it is the purchaser who receives the benefit. In any event, Cutrale maintains that CPI's records clearly demonstrate that the gains or losses incurred on all futures transactions are a material component of the price it receives for the merchandise.

Finally, Cutrale contends that the Department has the legal authority to make its requested price adjustments, even though some of them result in upward adjustments to price, despite the petitioners' claim to the contrary. According to Cutrale, the Courts have recognized that, under section 772(d)(1)(B) of the Act, the Department has the authority to make an adjustment to U.S. price where the claimed expenses result from and bear a direct relationship to the particular sale in question. See Koyo Seiko Co. v. United States, 36 F.3d 1565, 1571 (CAFC 1994). Cutrale maintains that 19 CFR 351.401(c) allows the Department to make both upward and downward adjustments to export price which are reasonably attributable to the subject merchandise. Cutrale asserts that precedents cited by the petitioners to support their arguments (see below) either support Cutrale's own position or are inapposite. Specifically, Cutrale maintains that, in Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326 (CIT 2004) (Luoyang Bearing), the CIT affirmed the Department's authority to make an upward adjustment to price when it

upheld an increase to U.S. price. See Luoyang Bearing at 1360-1361. Further, Cutrale maintains that the petitioners' reliance on Thyssen Stahl AG v. AK Steel Corp., 1998 U.S. App. LEXIS 17064 (CAFC 1998) (Thyssen) is misplaced because that case dealt with currency hedging, rather than hedging related to sales of subject merchandise.

Similar to Cutrale, the petitioners also disagree with the Department's treatment of gains and losses on futures transactions in the preliminary determination. However, the petitioners request that the Department take the opposite action and make no adjustment to gross unit price for any of these amounts. As a threshold matter, the petitioners claim that an upward adjustment to CEP for futures contract gains is contrary to the clear language of the Act. The petitioners state that section 772(d)(1)(B) of the Act requires that CEP be reduced by expenses that result from and bear a direct relationship to the sale. According to the petitioners, the Court has stated that the Act only allows for reductions in U.S. price to account for expenses, and not increases to account for gains. See Thyssen at page 9. The petitioners argue that absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive. See Ad Hoc Comm. v. United States, 13 F.3d 398 (CAFC 1994). Thus, the petitioners maintain that by making an upward adjustment to U.S. price for futures gains, the Department is in effect treating futures gains as a "negative expense," which clearly contradicts the law.

Moreover, the petitioners contend that the Department particularly should not make any adjustment to U.S. price (either upward or downward) for EFP sales. According to the petitioners, Cutrale stated at verification that it did not calculate contract-specific gains or losses for EFP sales because it cannot associate particular shipments with individual contracts. See the CPI Sales Verification Report at pages 17 and 18. The petitioners argue that making any adjustment to U.S. price for futures contract gains and losses on EFP sales would be contrary to U.S. law because: 1) Cutrale has reported futures contracts in its U.S. sales listing on a combined basis by shipment, rather than individually by futures contract; and 2) prior to March 2004, CPI did not record gains and losses in a sales revenue account. Given these facts, the petitioners argue that Cutrale has failed to establish that the gains and losses on EFP sales are tied directly to a particular sale and, as a result, has failed to meet the burden set forth under 19 CFR 351.410(c), which states that direct selling expenses are expenses that result from and bear a direct relationship to the particular sale in question. The petitioners assert that this interpretation of the regulations has been upheld by the courts. See, e.g., Torrington Co. v. United States, 146 F.Supp. 2d 845, 889 (CIT 2001), where the court recognized that the party claiming the circumstance-of-sale adjustment under this regulation bears the burden of establishing that the claimed expenses relate directly to particular sales.

The petitioners maintain that in its only previous case dealing with gains and losses related to futures contracts, the Department found that futures gains and losses were not "directly related" to sales of subject merchandise. As support for this assertion, the petitioners cite Softwood Lumber Final Determination at Comment 21. According to the petitioners, the NAFTA panel upheld the Department's treatment of futures gains and losses in Softwood Lumber Final Determination, stating that futures trading profits and losses were not related to import sales. See In the Matter of: Certain Softwood Lumber Products from Canada: Final Affirmative

Antidumping Determination, Secretariat File No. USA-CDA-2002-1904-02 (July 17, 2002) (NAFTA Panel Report) at page 125.

The petitioners reject Cutrale's claim that the Softwood Lumber Final Determination and subsequent NAFTA Panel Report support the treatment of futures gains and losses as an adjustment to U.S. price. According to the petitioners, Cutrale interprets Softwood Lumber Final Determination to mean that the Department would make an adjustment to U.S. price for gains related to futures contracts that are linked to the eventual delivery of subject merchandise. The petitioners maintain that this interpretation is incorrect because, in Softwood Lumber Final Determination, the Department only rejected making an adjustment for futures gains and losses on contracts that did not "result" in a shipment. Further, the petitioners point out that, in Softwood Lumber Final Determination, the Department never made a direct adjustment to CEP for profits and losses made on futures contracts, as Cutrale is requesting. The petitioners contend that the NAFTA panel upheld the Department's determination and stated that there was no basis either to: 1) treat the respondent's futures trading gains as a direct expense related to its U.S. sales; or 2) find that the respondent's gains on futures trading activities were directly related to sales of subject merchandise. See NAFTA Panel Report at 125. The petitioners also cite United States -- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R; (04-1429) 2004 WTO DS LEXIS 15 (WTO Lumber Panel), where the WTO panel held that the revenue from futures trading gains is generated from the sale of the futures contract, rather than sales of softwood lumber.

In any event, the petitioners contend that the Department's verification report demonstrates that Cutrale accounts for futures gains and losses in the same manner as it accounts for rollover gains and losses. See the CPI Sales Verification Report at page 18. According to the petitioners, the Department disregarded rollover gains and losses in the preliminary determination because such an adjustment would have been contrary to Softwood Lumber Final Determination. Because the Department did not make an adjustment to U.S. price for rollover gains and losses in the preliminary determination, the petitioners maintain that it would be inconsistent for the Department to continue to make such an adjustment for non-rollover gains and losses on EFP transactions.

Moreover, the petitioners contend that adjusting U.S. price to account for futures gains on EFP transactions is improper because these gains do not have any impact on the net outlay of the purchaser of the subject merchandise. According to the petitioners, 19 CFR 351.102(b) defines a price adjustment as a change in the price charged for subject merchandise which is reflected in the purchaser's net outlay. The petitioners argue that, because it is not the ultimate customer that pays the gain on a futures contract, the U.S. price should not be adjusted to account for it. As support for this assertion, the petitioners cite the preamble to the Department's regulations Antidumping Duties; Countervailing Duties, 62 FR 27296, 27300 (May 19, 1997) (Preamble), quoted in Luoyang Bearing at 1326. The petitioners maintain, therefore, that the correct gross unit price for EFP sales is the crossing (i.e., invoice) price. The petitioners contend that any gain on the contracts received by Cutrale from its broker are not relevant to U.S. price because this amount is not related to the price paid by Cutrale's customer. Thus, according to the petitioners,

where there is a delivery of subject merchandise pursuant to an EFP sale, there are no futures gains or losses — only the price paid by the customer. In support of this assertion, the petitioners cite the NAFTA Panel Report, where the panel stated that the respondent only realized gains and losses on futures trading activities when a futures contract did not result in a sale of subject merchandise. See the NAFTA Panel Report at page 125.

Finally, the petitioners maintain that the manner in which Cutrale records its futures contract revenue and the fact that Cutrale's futures profits and losses are treated under U.S. tax law as hedging gains and losses, rather than gains and losses from speculation, are irrelevant to the proper resolution of this issue. The petitioners maintain that Cutrale has offered no evidence that its futures gains and losses in any way affect the price actually paid by the purchaser for subject merchandise and, thus, they should not be treated as an adjustment to U.S. price. In any event, the petitioners disagree with Cutrale's contention that it would be unfair for the Department to treat futures gains and losses differently from how they are treated by the IRS. The petitioners note that tax laws and antidumping duty laws were created for different purposes, and the treatment of futures contract gains and losses under these laws is not comparable in this instance.

#### Department's Position:

The antidumping duty statute is promulgated to remedy injurious dumping. See section 731 of the Act. In this case, CPI engaged in futures trading activity in making certain sales of subject merchandise. Examining U.S. sales based on futures contracts poses unique issues the Department must address within the confines of the antidumping duty law. Specifically, Cutrale reported two types of sales involving futures contracts: 1) sales made to the NYBOT; and 2) EFP sales. As explained above, sales to the NYBOT are "standard" futures transactions, where the sale of the futures contract is to the NYBOT and merchandise is delivered to the bearer of the NYBOT's delivery certificate. Sales to EFP customers are similar, but in an EFP sale, Cutrale and its customer agree to exchange futures contracts at a price which is negotiated by the two parties.

In our preliminary determination, we treated gains and losses on futures contracts noticed for delivery during the POI as price adjustments and rollover gains and losses on "canceled and reopened" contracts as indirect selling expenses. See Preliminary Determination, 70 FR at 49561. We continue to find that this treatment is appropriate for purposes of the final determination.

Under 19 CFR 351.102(b), a price adjustment is defined as

any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates, and post-sale price adjustments that are reflected in the purchaser's net outlay.

As explained in the preamble to the Department's regulations, price adjustments are not "expenses" as the Department usually uses that term, but rather changes that the Department

must take into account in identifying the actual starting price (either as additions or deductions).<sup>18</sup> See Preamble, 62 FR at 27300. In this case, we find that the actual starting price is the price at which Cutrale agreed to sell – and the purchaser (i.e., the person who took the corresponding long position) agreed to buy – subject merchandise. Because gains and losses on the final futures contract are an essential component of this price, we have properly treated them as a price adjustment. While Cutrale may have received payment of that price from two different sources (i.e., from the NYBOT via a futures invoice and from a broker who received the gain/loss via the NYBOT), this distinction is not meaningful. Thus, we disagree with the petitioners that the price reflected on the invoice is the appropriate starting price because it does not reflect the full amount agreed upon by the parties.

Regarding EFP sales, we also disagree with the petitioners that the invoice price is the proper starting price for these transactions. Similar to “standard” futures sales, the gain or loss on EFP sales is an essential component of the price agreed upon by the parties. The only difference between EFP and standard futures transactions relates to the price at which the futures contracts held by Cutrale and the EFP customer are “crossed.” Specifically, we found at verification

. . . that the crossing price is negotiated based on the prices on the contracts that both parties are holding and that these negotiated prices are relatively close to the market price on the crossing date. Company officials stated that, when CPI sells NFC pursuant to FCOJ futures prices, it receives a premium over the futures price.

See the CPI Sales Verification Report at page 7.

Because the starting point for the price ultimately agreed upon by the parties is the price shown on the futures contracts held by each party, any associated gains or losses are clearly relevant to the reported sales. Thus, we have also treated gains and losses on the final contract for EFP transactions as a price adjustment.

We disagree with the petitioners that the Department is precluded from making price adjustments on EFP sales because Cutrale reported gains and losses on a shipment-, rather than a contract-, specific basis. At verification we confirmed that the non-rollover gains and losses reported for specific EFP transactions were directly linked to actual shipments in the U.S. sales listing. See the CPI Sales Verification Report at page 18.<sup>19</sup> Similarly, we disagree with the petitioners that

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<sup>18</sup> In light of this definition, we find both Cutrale’s analogy to credit expenses and the petitioners’ argument related to expenses deducted under section 772(d)(1)(B) of the Act and 19 CFR 351.410(c) to be inapposite. Similarly, we find that the petitioners’ reliance on Thyssen and Luoyang Bearing to be misplaced because the former case related to expenses associated with currency hedging rather than to adjustments to the starting price, while the latter upheld the Department’s authority to make upward post-sale price adjustments.

<sup>19</sup> Specifically, this report states:

Cutrale did not record these gains and losses in a revenue account during the entire POI. As noted on page 7 of the CPI Sales Verification report, the company recognized these gains and losses as revenue throughout the POI; it merely had a different method for recording the amounts in its accounting system for a portion of it. Therefore, because we find that Cutrale correctly calculated these gains and losses and recognized the revenue related to them, we have continued to allow them for purposes of the final determination.

Regarding rollover gains and losses, we disagree with Cutrale that these gains and losses should be considered part of the starting price because they are not necessarily linked to the sale to the ultimate purchaser. At verification Cutrale described its rollover process as follows:

Company officials stated that CPI determines whether to roll over contracts based on its anticipated delivery schedule. For example, company officials stated that CPI has sales agreements with its EFP customers; CPI delivers orange juice to these customers based on when the customer places an order under the agreement. According to company officials, CPI takes short positions on the futures market based on when it expects the customer to take delivery; however, if the customer orders less in a given month than expected, CPI either tries to deliver the product to different customers or it rolls over the contracts.

See the CPI Sales Verification Report at page 9.

Given this description, we disagree with Cutrale that these gains and losses are tied to specific shipments to particular customers. While Cutrale's books and records do associate rollover gains and losses with actual shipments, we disagree that this signifies that the shipments themselves occur as a direct result of the rolled over contracts. At most, this fact merely confirms Cutrale's statements that the company intends to ship merchandise in general (i.e., that the company engages in hedging rather than speculation) and not that it intended to ship merchandise to a particular customer on a particular date.

Because these gains and losses were realized before the relevant sale was made, we find that they do not affect the final price of the reported transaction. As a consequence, we find that it would

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. . . we noted that CPI tracks gains and losses on a delivery-specific basis, because each "page" in its sales system shows: 1) a "crossing profit/loss," which is the amount of the gain or loss on the contracts on the page, less any brokerage fees; and 2) a "switching profit/loss," which is the amount of the gain/loss on contracts in the delivery which had been rolled over from prior months.

This report also states that for selected EFP transactions we reviewed the calculation of the profit and loss on the final futures contract. During this review, we tied the amount reported in the sales listing to the relevant accounts in CPI's accounting system and to the appropriate "page" in CPI's sales system without noting any discrepancies. Id.

not be appropriate to treat these amounts as price adjustments on individual sales transactions. Nonetheless, we agree with Cutrale that these amounts are associated with selling subject merchandise in the United States, and as such they should be accounted for in our final margin calculations. Because we find that they are not directly associated with specific transactions, we have continued to classify these amounts as part of indirect selling expenses, consistent with our treatment of them in the preliminary determination. For further discussion, see Comment 9 below.

We disagree with Cutrale that its “hedger” status under U.S. GAAP and IRS rules is relevant to our determination as to whether rollover gains and losses constitute a price adjustment under the meaning of 19 CFR 351.102(b). As the petitioners correctly note, the tax and antidumping duty laws were created for different purposes. While U.S. tax law may provide guidance, the Department is required to follow its own Act, regulations, and practice. For example, when the Department is required to determine the country of origin of imported merchandise, we may look to rulings by CBP for guidance, but we are not bound by them. This principle has been upheld by the Court, which has found that “the ITA, not the Customs Service, is responsible for clarifying, where necessary, the scope of dumping findings and antidumping orders.” See Diversified Products Corp. v. United States, 572 F.Supp. 883, 887 (CIT 1983). Thus, we similarly find that Cutrale’s status under U.S. tax law does not dictate the appropriate classification of these gains/losses under the antidumping duty law.

Finally, we disagree with the petitioners’ interpretation of Softwood Lumber from Canada Final Determination. In that case, the respondent made gains and losses on two types of futures transactions: 1) trades of futures contracts that resulted in the delivery of subject merchandise; and 2) trades of futures contracts that did not. Contrary to the petitioners’ assertions, we included the former type of gains and losses in the gross unit price of the sale, while we treated the latter type as an offset to indirect selling expenses. We note that our treatment of gains and losses here is consistent with our treatment of them in Softwood Lumber from Canada Final Determination because we treated those which were part of the starting price as a price adjustment and those which were not as part of indirect selling expenses.

Comment 9: *Offset to Indirect Selling Expenses for Futures Trading Gains and Losses for Cutrale*

As noted above, in the preliminary determination, the Department included all gains and losses on rolled over future contracts as an offset to CPI’s indirect selling expenses. See Preliminary Determination, 70 FR at 49561. The petitioners contend that, notwithstanding their arguments in Comment 8, above, if the Department continues to follow this methodology in the final determination, it should allocate any offset to indirect selling expenses over either: 1) Cutrale’s worldwide sales; or 2) the U.S. operations of both of Cutrale’s U.S. affiliates, CPI and Cutrale

Citrus Juices (CCJ).<sup>20</sup> The petitioners note that the Department has generally included hedging gains and losses in the calculation of indirect selling expenses because these gains and losses are part of the expenses of a company doing business in the U.S. market. See Federal-Mogul Corp. v. United States, 18 CIT 785 (Aug. 26, 1994) (Federal-Mogul v. United States). The petitioners maintain that the NYBOT is the only futures market that trades FCOJ contracts in the world and the price of FCOJ is indexed to NYBOT FCOJ futures prices. Therefore, according to the petitioners, when CPI hedges the risk of price fluctuations by participating in the FCOJ futures market, it is, in effect, buying an insurance policy for all of Cutrale's worldwide sales. As support for this assertion, the petitioners cite the WTO Lumber Panel, where the panel ruled that hedging activities could have an impact on the price of softwood lumber sold in the United States, Canada, and elsewhere. See WTO Lumber Panel at 599.

Further, the petitioners maintain that the Department must cap any offset by the amount of CPI's indirect selling expenses because calculating a negative indirect selling expense ratio (as was done in the preliminary determination) is contrary to law. The petitioners contend that section 772(d)(1) of the Act only permits the Department to reduce U.S. price by the amount of expenses incurred by or for the account of the exporter in the United States. In support of this assertion, the petitioners cite Thyssen at page 9, where the CAFC held that the statute only allows for reductions to U.S. price to account for expenses, and not increases to account for gains, associated with subject merchandise. As further support for their position, the petitioners cite In the Matter of Sales at Less Than Fair Value of Certain Softwood Lumber from Canada, Remand Redetermination, Secretariat File No. USA-CDA-2002-1904-02, NAFTA Binational Panel Review in Softwood Lumber from Canada (Lumber Remand Redetermination), where the Department revised its initial negative indirect selling expense rate calculation to cap the amount of the offset for futures trading gains by the amount of indirect selling expenses. See Lumber Remand Redetermination at 6 and 7.

Finally, the petitioners contend that the Department should limit the amount of futures gains considered as an offset to futures gains earned during the POI. The petitioners claim that the Department's findings at verification show that Cutrale's claim of POI futures gains is overstated because they include gains earned on pre-POI sales. See the CPI Sales Verification Report at page 12. Consequently, the petitioners contend that the Department should include only those gains and losses incurred during the POI and recorded in CPI's financial statements as an offset in its calculation of indirect selling expenses for the final determination.

Cutrale argues that, should the Department fail to include all futures gains and losses as an adjustment to U.S. price, it should apply the full amount of the net gain or loss related to futures contracts as an offset to CPI's indirect selling expenses. Cutrale contends that the Department and the NAFTA Panel decision on softwood lumber from Canada have conceded that all futures

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<sup>20</sup> The petitioners allege that such treatment would be appropriate because, as the Department noted at verification, CCJ merely acted as an intermediary for CPI during the POI. See the CPI Sales Verification Report at page 2.

gains and losses associated with subject merchandise, but not directly tied to particular sales, can be included as an offset to indirect selling expenses because this futures activity is clearly related to selling activities and their exposure to price changes. See NAFTA Panel Report at page 128.

In addition, Cutrale asserts that the petitioners' reliance on Lumber Remand Redetermination is misplaced. According to Cutrale, the Department in that case misapplied the statute and defied court precedent with regard to the capping of expenses. In fact, Cutrale contends that it has been longstanding Department practice to allow certain expenses, such as imputed credit expenses, to be negative. In support of this assertion, Cutrale cites Aimcor v. United States, 141 F.3d 1098 (Fed. Cir. Apr. 9, 1998) and Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia, 70 FR 13456 (Mar. 21, 2005). Cutrale argues that it would be unfair for the Department to cap indirect selling expenses, but not imputed credit expenses, because futures gains are actual revenue, whereas negative imputed credit expenses are not.

Finally, Cutrale disagrees that it is appropriate to allocate futures gains and losses over Cutrale's worldwide sales. Cutrale maintains that the Department does not have enough data to perform this calculation accurately because Cutrale has reported only hedging gains related to sales of subject merchandise, and not those related to CPI's POI sales of Florida orange juice.

#### Department's Position:

As noted above, in the preliminary determination, the Department included all gains and losses on rolled over futures contracts as an offset to CPI's indirect selling expenses. See Preliminary Determination, 70 FR at 49561. However, we agree with the petitioners that, consistent with Lumber Remand Redetermination, we should cap the total amount of the offset to indirect selling expenses for gains and losses on rolled over futures contracts by the total amount of indirect selling expenses for CPI. As indicated in Lumber Remand Redetermination, the CEP can only be reduced by indirect selling expenses. See Lumber Remand Redetermination at pages 6 and 7. Therefore, we have capped the offset to CPI's indirect selling expenses for futures gains and losses on rolled over futures contracts by the total amount of indirect selling expenses for CPI.

We disagree with the petitioners that it is appropriate to allocate the offset to indirect selling expenses for rollover gains and losses over Cutrale's worldwide sales or over total U.S. sales, *i.e.*, sales by CPI and CCJ. As noted by Cutrale, the record of this proceeding does not contain the data necessary to perform such a calculation. Even if such information were on the record, however, we disagree with the petitioners argument that the offset to indirect selling expenses for gains and losses on rolled over futures contracts should be allocated over Cutrale's worldwide sales because the record evidence demonstrates that the gains and losses on rolled over futures contracts were only associated with the selling activities of CPI, and were not related to the selling activities of any other entity.

In addition, we find the petitioners' argument that Cutrale overstated its reported gains and losses from hedging is misguided. The portion of the CPI verification report cited by the petitioners

describes a worksheet used to reconcile Cutrale's reported sales quantity and value to its audited financial statements. We noted in the CPI verification report that the hedging revenue amounts shown on this worksheet are based on shipment date rather than sale date. In addition, these amounts include all futures contracts gains and losses, not only those related to rolled over futures contracts. We also note that the total amount of POI rollover gains and losses applied by the Department as an offset to indirect selling expenses was calculated by summing the rollover gains and losses on POI sales, as defined by the date of sale (*i.e.*, notice date), rather than shipment date. Moreover, the CPI verification report confirms that Cutrale's hedging gains and losses were properly reported and does not indicate that these revenues were overstated in the U.S. sales listing.

Comment 10: CEP Offset for Cutrale

In the preliminary determination, we found no difference in the level of trade (LOT) between home market and U.S. sales for Cutrale. Therefore, we did not grant Cutrale a CEP offset in our calculations for the preliminary determination.

Cutrale argues that the Department should grant it a CEP offset because its home market sales are at a more advanced LOT than its U.S. CEP sales. Specifically, Cutrale notes that it provides engineering services and technical assistance to its home market customers, but does not perform these activities for U.S. sales. Further, Cutrale contends that there is no way to measure the pattern of price differences created by the increased selling functions performed for home market sales. Therefore, Cutrale contends that, in accordance with section 773(a)(7)(B) of the Act, the Department should grant it a CEP offset.

The petitioners agree with the Department's decision to deny Cutrale's request for a CEP offset in the preliminary determination. According to the petitioners, the Department analyzed Cutrale's reported selling functions in the home and U.S. markets and correctly determined that home market sales were not made at a more advanced LOT than Cutrale's CEP sales. The petitioners maintain that it is the Department's longstanding practice, in accordance with 19 CFR 351.412(f), to allow a CEP offset only when a respondent has successfully established that the NV LOT is at a more advanced stage of marketing and distribution than the CEP LOT.

The petitioners maintain that Cutrale has not demonstrated that its home market sales were made at a more advanced LOT than its CEP sales. Specifically, the petitioners state that Cutrale's claim is based solely on differences in the selling functions chart it provided to the Department and that Cutrale did not provide any further evidence to support its claim, either in its supplemental questionnaire responses or at verification. The petitioners assert that the burden of proving that home market sales were made at a more advanced LOT than CEP sales lies with the respondent and that Cutrale has not met this burden. As support for this assertion, the petitioners cite Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Germany: Final Results of Antidumping Duty Administrative Review, 63 FR 13217, 13225 (Mar. 18, 1998) (Small Diameter Pipe from Germany).

Department's Position:

The Department's regulations at 19 CFR 351.412(f)(1) state that:

The Secretary will grant a constructed export price offset only where:

- (i) Normal value is compared to constructed export price;
- (ii) Normal value is determined at a more advanced level of trade than the level of trade of the constructed export price; and
- (iii) Despite the fact that a person has cooperated to the best of its ability, the data available do not provide an appropriate basis to determine under paragraph (d) of this section whether the difference in level of trade affects price comparability.

We note that all of Cutrale's reported U.S. sales were CEP sales made through one or both of its two U.S. affiliates, CPI and CCJ. In the preliminary determination, we stated:

We found that both respondents performed essentially the same selling functions in their sales offices in Brazil for both home market and U.S. sales. Therefore, the respondents' sales in Brazil were not at a more advanced stage of marketing and distribution than the constructed U.S. LOT...

See Preliminary Determination, 70 FR at 49563. In determining whether NV is at a more advanced LOT than the CEP LOT, we examined Cutrale's reported selling functions for home market and CEP sales. Cutrale's supplemental section A questionnaire response indicates that it provides engineering services and technical assistance for home market sales, but not for CEP sales. However, according to this response, Cutrale provided: 1) engineering services "from time to time," and 2) technical assistance for both U.S. and home market sales. See Cutrale's May 6, 2005, response at page Supp. A-6 and Supp. A-7. Thus, we find that these services are more accurately characterized as occasional consultative services than as general selling functions regularly performed for home market customers.

When claiming a CEP offset, a respondent must demonstrate, at a minimum, that the selling functions performed for sales at allegedly different LOTs are substantially different. See 19 CFR 351.412(c)(2). See also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61746 (Nov. 19, 1997) (minimal differences in selling functions do not warrant a CEP offset); Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada, 67 FR 8781 (Feb. 26, 2002), and accompanying Issues and Decision Memorandum at Comment 8 (the Department consolidated selling functions into sub-groupings in order to analyze effectively the differences in selling activities); and Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 53621, 53625 (Sept. 9,

2005) (the Department looked for a substantial difference in selling functions performed for sales at allegedly different LOTs). Because the differences in selling functions reported by Cutrale for home market and CEP sales are not substantial, we continue to find that Cutrale's home market sales were not at a more advanced LOT than its CEP sales and, thus, a CEP offset is not warranted. Furthermore, because Cutrale has not demonstrated that its home market sales were made at an LOT more remote from the factory than that of its CEP sales, the Department is not required to address whether a pattern of consistent price differences between home market and CEP prices exists. See Small Diameter Pipe from Germany, 63 FR at 13225.

Comment 11: International Freight Expenses for Cutrale

Cutrale requests that the Department rely on the revised per-unit international freight amounts reported in Cutrale's August 17, 2005, response for the final determination.

The petitioners did not comment on this issue.

Department's Position:

We examined the expenses at verification and found no significant discrepancies. Thus, we have relied on these international freight expenses, adjusted based on our findings at verification, for purposes of the final determination.

Comment 12: Fischer's Unreported U.S. Sales to Puerto Rico

The petitioners contend that, at verification, the Department discovered that Fischer failed to report certain U.S. sales made to Puerto Rico during the POI. The petitioners note that they alerted the Department to the possibility that Fischer had not reported sales to Puerto Rico during the POI several times, which prompted the Department to repeatedly question Fischer regarding U.S. sales of merchandise produced by other manufacturers. The petitioners contend that Fischer's explanation for its failure to report these transactions (i.e., that it does not consider this merchandise to be a Fischer sale, but rather the sale of a different manufacturer) is illogical because Fischer reported sales of subject merchandise manufactured by other producers in its U.S. sales listing. Therefore, given that Fischer failed to disclose these sales to the Department until the time of its sales verification in Brazil despite repeated questioning, the petitioners urge the Department to apply AFA to the value of these transactions, in accordance with sections 776(a)(2) and (b) of the Act. As AFA, the petitioners assert that the Department should use the highest margin stated in the notice of initiation, which is 60.29 percent.

Fischer disagrees that its explanation is illogical and instead argues that the petitioners have misrepresented the facts surrounding these sales. Fischer maintains that it would have been inappropriate to include these sales in its sales listing because they were both produced and sold by another respondent in this case. Specifically, Fischer asserts that it purchased the inventory of another Brazilian manufacturer during the POI; however, it subsequently sold the the product back to this company which then made the final sale to the unaffiliated U.S. customer. Fischer

claims that, to the best of its knowledge, this orange juice entered a foreign trade zone (FTZ) in Puerto Rico and was withdrawn for consumption as non-subject merchandise. Finally, Fischer asserts that the information related to these Puerto Rico sales was fully verified and the Department noted no discrepancies. Consequently, Fischer argues that the application of AFA is not warranted in this situation.

Department's Position:

We disagree with the petitioners that it would be appropriate to apply AFA to the sales value of these Puerto Rico transactions because of the unusual nature of these sales. At verification, we found that Fischer sold merchandise produced by another manufacturer to Puerto Rico during the POI which was not reported in the U.S. sales listing. However, company officials explained that this merchandise was sold to the customer in the United States by the other manufacturer, as this manufacturer held a contract to supply the merchandise to the customer in the United States. For a detailed discussion of this transaction, see the October 20, 2005, memorandum from Elizabeth Eastwood and Nichole Zink to Louis Apple entitled, "Verification of the Sales Questionnaire Responses of Fischer S/A– Agroindustria in the Antidumping Duty Investigation of Certain Orange Juice from Brazil" (Fischer Sales Verification Report) at page 9.

Based on our findings at verification, we find that evidence suggests Fischer was not the first party to have knowledge of the destination of the subject merchandise involved in these transactions. Further, the documents we examined at verification demonstrated that, while Fischer was listed as the shipper on the bills of lading for these sales, it issued the corresponding commercial invoices to the other manufacturer, not the customer in the United States. See the Fischer Sales Verification Report at page 9 and verification exhibit 19. Thus, we find that Fischer properly excluded these sales from its U.S. sales listing. As a result, we have continued to disregard these sales for purposes of the final determination.

Comment 13: Packing Services Provided by an Affiliate of Fischer

During the POI, Fischer used an affiliated party to pack certain sales of Dairy Pak. At verification, we attempted to substantiate the arm's-length nature of the affiliate's packing charges, but found that Fischer was unable to provide any documentation for similar services performed by unaffiliated parties. See the Fischer Sales Verification Report at page 22.

The petitioners assert that, because the Department could not verify the arm's-length nature of these packing services, it should base the amount of them on facts available (FA). As FA, the petitioners contend that the Department should: 1) accept these expenses as reported for purposes of the cost test; and 2) disallow the portion of the packing expenses incurred by the affiliate for purposes of calculating NV.

Fischer disagrees that the use of FA is appropriate. According to Fischer, it disclosed all information to the Department related to these packing expenses both in its questionnaire responses and at verification. Thus, Fischer argues that the Department should rely on the

expenses set forth in the sales verification report. See the Fischer Sales Verification Report at page 1.

Department's Position:

We agree with the petitioners that it is appropriate to apply FA to Fischer's valuation of packing services provided by its affiliate. However, we disagree with the petitioners' suggestion that the Department should disallow these expenses in its price-to-price comparisons because: 1) that action would constitute AFA, not merely FA; 2) we did not solicit alternative data from Fischer; and 3) given that Fischer has not been uncooperative with respect to this issue, there is no basis for applying AFA.

In its initial questionnaire response, Fischer notified the Department that it used an affiliated party to pack certain merchandise sold in the home market. Because it is the Department's practice to determine that transactions between affiliated parties are at arm's length before using them in its analysis, we requested that Fischer provide documentation that the packing services performed by the affiliate were at arm's length. In response, Fischer provided the invoice for these services from the affiliate but did not provide comparable invoices to unaffiliated parties. At verification, we again attempted to determine the arm's-length status of these transactions; however, Fischer was unable to provide any documentation to demonstrate this because the affiliate did not provide similar services to any other party. See the Fischer Sales Verification Report at page 22.

Given that additional documentation does not exist, we find that Fischer has complied with each of our requests for information to the best of its ability. Because there is no evidence on the record of this case which contradicts Fischer's claim that these expenses are at arm's length, we have accepted them (as revised at verification) as FA for purposes of the final determination.

Comment 14: *U.S. Duty Reimbursements for Fischer*

After the preliminary determination in this case, Fischer submitted a revised U.S. sales listing which contained: 1) data solicited by the Department in response to a supplemental questionnaire; and 2) additional data found when preparing Fischer's submitted sales reconciliations. As part of this submission, Fischer reported that it received reimbursements of U.S. duties from its customers during the POI, and it reported the per-unit amount of these reimbursements in its revised sales database.

Fischer notes that the preamble to the Department's regulations directs the Department to use a price that is net of any price adjustment reasonably attributable to the subject merchandise. As support for this assertion, Fischer cites the preamble to the Department's regulations. See Preamble, 62 FR at 27344. Thus, Fischer maintains that the Department should adjust its U.S.

sales by the net duty amount for those sales where the customer reimbursed CNA.<sup>21</sup> Fischer notes that the Department verified that its customer actually reimbursed the company for the U.S. duty expenses incurred, and thus the net U.S. duty paid on such sales is zero.

The petitioners did not comment on this issue.

Department's Position:

We examined Fischer's claim for duty reimbursement at verification and confirmed that the customer did in fact reimburse the company for the duties in question. See the CNA Sales Verification Report at pages 17 and 18. Consequently, we offset Fischer's U.S. duty expenses by the amount of these reimbursements, where applicable, in our calculations for the final determination.

Comment 15: Bunker Fuel Adjustments for Fischer

Fischer reported certain "adjustments" related to bunker fuel costs in its U.S. sales listing. For the preliminary determination, we treated these adjustments as a component of movement expenses because Fischer did not adequately explain to what these adjustments related.

Fischer maintains that the Department should grant it an offset to U.S. freight expenses for its reported bunker fuel adjustments. Fischer notes that, during the POI, its international freight provider charged it for bunker fuel as a part of international freight expenses. According to Fischer, when the price of bunker fuel is higher than an agreed value at the time of shipment, its freight provider assesses a surcharge. Fischer further notes that, pursuant to the contract between CNA and its customer, the customer is required to reimburse CNA for this surcharge. Fischer notes that the Department verified its reported bunker fuel adjustment, citing the CNA Sales Verification Report at page 24. Consequently, Fischer asserts that the Department should treat its reported bunker fuel adjustment as an offset to U.S. freight expenses in its calculations for the final determination.

The petitioners did not comment on this issue.

Department's Position:

We examined the adjustments in question during verification and confirmed that: 1) Fischer paid the bunker fuel surcharge to its international freight provider as a part of the international freight expenses reported in the U.S. sales listing; and 2) CNA received reimbursement of this bunker

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<sup>21</sup> Fischer claims that the Department should have taken this data into account for the preliminary determination because duty reimbursements were reported under the net duty field. However, a review of Fischer's data shows that the duty reimbursements in question were reported for the first time in Fischer's August 17, 2005, submission.

fuel surcharge from its customer during the POI. See the CNA Sales Verification Report at page 24 and the Fischer Sales Verification Report at pages 25 and 26. Therefore, we find that it is appropriate to treat Fischer's reported bunker fuel adjustments as an offset to U.S. freight expenses, and we have done so for the final determination.

Comment 16: Home Market Credit Expenses for Fischer

In its home market sales listing used for the preliminary determination, Fischer reported making all of its home market sales in Brazilian reais. Thus, for the preliminary determination, we recalculated home market credit expenses for Fischer using a reais-denominated interest rate (*i.e.*, the SELIC interest rate published by the International Monetary Fund's International Financial Statistics) because Fischer did not report home market borrowings during the POI.

Fischer contends that this methodology is inappropriate because: 1) its home market sales are negotiated in U.S. dollars; and 2) it is the Department's policy to calculate home market credit expenses using a short-term interest rate tied to the currency of the sale. As support for this assertion, Fischer cites the February 23, 1998, Import Administration Policy Bulletin entitled, "Imputed Credit Expenses and Interest Rates" (IA Credit Expenses Policy Bulletin) at page 2. Thus, Fischer argues that the Department should use a U.S.-dollar-denominated interest rate to calculate home market credit expenses.

According to Fischer, all of its home market sales were negotiated in U.S. dollars and the invoiced reais amount was determined based on the U.S.-dollar exchange rate in effect the day before invoicing. Fischer notes that this is in accordance with Brazilian law, which requires that all transactions within Brazil must be handled in local currency. Therefore, Fischer contends that the Department should determine that the currency of its home market sales for the purposes of home market credit expenses is U.S. dollars, consistent with Department's practice of determining the currency of a respondent's sales based on the currency which controls the ultimate amount a purchaser pays for the sale. As support for this assertion, Fischer cites Notice of Amendment of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea; and Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 66 FR 45279, 45279-45280 (Aug. 28, 2001) (SSPC and SSSC from Korea), where the Department found that the currency of the sales in question was U.S. dollars when home market sales were: 1) invoiced in U.S. dollars; and 2) paid based on the U.S. dollar amount of the sale converted into local currency. See also Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000), and accompanying Issues and Decision Memorandum at Comment 8 (Pipe from Mexico); and Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (Jan. 26, 2005), and accompanying Issues and Decision Memorandum at Comment 4 (SSSC from Mexico). Consequently, Fischer argues that, in accordance with the Department's policy and practice, it should use a U.S.-dollar short-term interest rate to calculate home market credit expenses.

The petitioners contend that the Department should disregard Fischer's argument because the facts surrounding it appear on the record of this case for the first time in Fischer's case brief. According to the petitioners, Fischer reported the currency of its home market sales included in its sales listing as reais. Further, the petitioners note that information related to home market sales contained in Fischer's questionnaire responses and verification exhibits demonstrate that the prices shown on Fischer's home market invoices are in reais. The petitioners also note that there is no mention of Fischer's home market sales being in U.S. dollars in Fischer's sales verification report.

Nonetheless, the petitioners assert that they have no objection to calculating Fischer's home market credit expenses using a U.S.-dollar denominated short-term interest rate. The petitioners suggest that the Department use the U.S.-dollar denominated short-term interest rate obtained at the verification of Fischer's U.S. affiliate, CNA. Alternatively, the petitioners argue that the Department should allow the original home market credit expenses reported by Fischer, which were based on a Brazilian central bank reais-denominated interest rate.

Department's Position:

We have examined the data on the record with respect to this issue and note that the order confirmations related to Fischer's home market sales examined at verification denote prices denominated in U.S. dollars.<sup>22</sup> However, we disagree that this fact alone indicates that we should calculate home market credit expenses using a U.S. dollar denominated short-term interest rate.

Significantly, we note that Fischer reported its home market sales in reais, not U.S. dollars, in its home market sales listing, and we verified that these prices were the same as those stated on Fischer's invoices to its home market customers. Thus, we find that Fischer's reliance on SSPC and SSSC from Korea, Pipe from Mexico, and SSSC from Mexico is misplaced, as in each of those cases the Department used the U.S.-dollar gross unit prices reported by the respondents. We disagree with the petitioners that it would be appropriate to apply a U.S.-dollar denominated interest rate to a reais-denominated gross unit price in the calculation of home market credit expenses. The Department's policy with regard to the calculation of imputed credit expenses is to use a short-term interest rate tied to the currency in which the sales are denominated. See the IA Credit Expenses Policy Bulletin at page 6. Consequently, because Fischer's home market sales are invoiced and reported in reais, we have made no change to the calculation of Fischer's home market credit expenses for purposes of the final determination.<sup>23</sup>

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<sup>22</sup> See the Fischer Sales Verification Report at verification exhibits 4, 5, and 7.

<sup>23</sup> In any event, we disagree with Fischer's implied argument that the appropriate currency of its home market prices is U.S. dollars. In Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review, 66 FR 56274 (Nov. 7, 2001), and accompanying Issues and Decision Memorandum at Comment 4 (Rebar from Turkey 99-00 Review), we examined the issue of the proper currency to use for a respondent's home market sales. In that case, we stated, "...the Turkish lira prices shown on the invoices were not

Comment 17: Indirect Selling Expense Ratio for Fischer

Fischer calculated an indirect selling expense ratio for its affiliated reseller using the affiliate's POI direct selling expenses (i.e., expenses related to export costs, customs documentation, and insurance claims), rather than its G&A expenses, because Fischer stated that the majority of the affiliate's G&A expenses related to the maintenance of an office and a salesperson in a third country. We recalculated the indirect selling expenses for this affiliate by taking its G&A expenses and deducting the expenses related to selling activities in a third country because we determined that such activities related to neither home market nor U.S. sales. We then divided these expenses by the affiliate's net sales to calculate a revised indirect selling expense ratio. See the Fischer Sales Verification Report at pages 17 and 18.

According to Fischer, the Department's methodology is inappropriate because its indirect selling expenses incurred in Brazil on U.S. sales are all but nonexistent. Fischer asserts that the sales system involving this affiliate is designed to serve all markets except North America, as North America is served by CNA, which has a fully integrated production and sales operation. Thus, Fischer contends that the Department should continue to use the indirect selling expense ratio for this affiliate reported in the U.S. sales listing and presented at verification.

The petitioners assert that Fischer's arguments are without merit. The petitioners note that, contrary to Fischer's claims that it does not incur selling expenses in Brazil related to U.S. sales, Fischer's submissions show that the affiliate in question is actively involved in the sales process for U.S. sales, as well as sales to other export markets. Thus, according to the petitioners, it is appropriate for the Department to account for its indirect selling expenses in its margin calculations. In fact, the petitioners note that the Department's verification report indicates that: 1) Fischer has an exclusive sales agreement with this affiliate for sales of its orange juice to North America, Europe, and Asia; and 2) this affiliate is responsible for arranging the transportation of subject merchandise to the United States. See the Fischer Sales Verification Report at page 5. According to the petitioners, the Department's recalculation of this affiliate's indirect selling expense ratio at verification was correct, as the Department removed those expenses which were clearly incurred to make sales to markets other than the United States. Therefore, the petitioners maintain that, for the final determination, the Department should use the revised indirect selling expense calculation obtained at verification for this affiliate.

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the final prices between the parties, but instead represented estimates of what Colakoglu believed would be the final lira amount at the time of payment." Id. This fact pattern stands in marked contrast to that of the instant investigation, where the reais prices shown on Fischer's home market invoices are the same as the reais amount Fischer receives from its customers. Thus, we find that the currency of Fischer's home market sales is reais.

Department's Position:

We have used the revised indirect selling expense ratio calculated for this affiliate at verification in our calculations for the final determination. While Fischer argues that it did not incur expenses in Brazil related to U.S. sales, the petitioners correctly note that the affiliate in question is involved in the sales process for all of Fischer's U.S. sales. See the Fischer Sales Verification Report at page 5.

We examined the selling expenses included in Fischer's submitted indirect selling expense ratio calculation and determined that the submitted expenses were direct (rather than indirect) expenses. See the Fischer Sales Verification Report at page 18. Consequently, it would be inappropriate to characterize these expenses as indirect selling expenses or to rely on them in our final calculations. Therefore, because: 1) Fischer did not demonstrate at verification that this affiliate's expenses did not relate to U.S. sales; and 2) we verified that the affiliate performed selling activities related to U.S. shipments, we have included the revised indirect selling expense ratio (*i.e.*, the indirect selling expense ratio for this affiliate computed using its POI G&A expenses less those expenses which were clearly linked to selling activities in a third country) in our calculations for the final determination.<sup>24</sup>

Comment 18: AFA for Montecitrus

The petitioners agree with the Department's decision to base the preliminary dumping margin for Montecitrus on AFA, based on the finding that Montecitrus significantly impeded the investigation by withdrawing from the investigation after being selected as a mandatory respondent. The petitioners maintain that Montecitrus did not act to the best of its ability to comply with the Department's request for information. Thus, the petitioners state that the Department's assignment of AFA to Montecitrus in the preliminary determination was supported by substantial evidence and was in accordance with law, and as a consequence it should be upheld in the final determination.

Montecitrus did not comment on this issue.

Department's Position:

We agree that the continued application of AFA to Montecitrus is warranted. Thus, for the final determination, we have continued to assign Montecitrus the highest margin stated in the notice of initiation, *i.e.*, 60.29 percent. Our rationale behind this decision is set forth in the "Adverse Facts Available" section of the accompanying Federal Register notice of our final determination.

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<sup>24</sup> We note that, because: 1) these expenses were incurred by Fischer's sales agent which is located in a third country and; 2) there is no evidence that they are associated with economic activity occurring in the United States, we have not treated these expenses as a deduction to U.S. price under section 772(d)(1) of the Act.

Comment 19: Clerical Errors in the Preliminary Determination for Cutrale

The petitioners argue that the Department made a clerical error in its preliminary margin calculations for Cutrale by failing to convert the product-specific costs reported on a per-metric ton (MT) basis to a per-pound-solid basis before calculating the DIFMER for FCOJM and NFC. The petitioners maintain that this conversion error caused Cutrale's U.S. sales of NFC to be compared to constructed value, rather than to home market sales of FCOJM, thereby distorting the dumping margin. To correct this error, the petitioners suggest that the Department convert the per-MT variable cost of manufacturing (VCOM) to a per-pound-solid basis using the standard brix levels for FCOJM and NFC prior to the calculation of the DIFMER adjustment.

Cutrale agrees that the Department made a clerical error in its calculation of the DIFMER adjustment. However, Cutrale disagrees with the petitioners' suggestion that the Department convert its reported product-specific costs using standard brix levels. According to Cutrale, in order to accurately convert the reported per-MT costs to a pound-solid basis, the Department should use the weighted-average brix level of sales of FCOJM and NFC reported in the home market and U.S. sales listings. Cutrale notes that the Department used these actual brix levels to convert a number of expenses incurred on a per-MT basis for the preliminary determination.

Finally, Cutrale contends that the Department should correct two additional clerical errors made in the preliminary determination. First, Cutrale asserts that the Department incorrectly recalculated ICMS taxes for certain home market sales. In addition, Cutrale argues that the Department incorrectly adjusted domestic warehousing expenses for certain U.S. sales, using data which had been superceded by a later submission. Therefore, Cutrale requests that the Department remove these programming adjustments for purposes of the final determination.

Department's Position:

We disagree that we made a clerical error in the preliminary determination by not converting Cutrale's product-specific per-MT costs to a pound-solid basis prior to calculating the DIFMER adjustment.

Although we calculated the DIFMER adjustment on a per-MT basis, we converted it into a per-pound-solid amount before adjusting for it in the final stages of our calculations. Therefore, we find that the calculations performed for the preliminary determination were mathematically correct. Nonetheless, we agree with the implied argument made by the parties that it is more appropriate to perform the 20-percent DIFMER test using per-pound-solid, rather than per-MT, amounts because the objective of the DIFMER test is to determine the price comparability of different products and both NFC and FCOJM are sold on a pound-solid basis in the U.S. market. Further, in the margin program, we match U.S. sales to comparable home market sales and compare prices on a pound-solid, rather than a MT, basis.

Regarding the conversion of VCOMs to a pound-solid basis, we note that Cutrale provided the actual brix level of each sale and that converting Cutrale's product-specific per-MT costs using a

weighted-average brix level derived from these actual brix levels would be more accurate than using estimated or “standard” brix levels. Consequently, for the final determination, we used this actual data to convert the VCOMs used in the DIFMER adjustment to a pound-solid basis.

Finally, we agree with Cutrale that we incorrectly recalculated ICMS taxes on certain sales and failed to base its warehousing expenses on its most current response. Therefore, we have corrected these errors for purposes of the final determination.

Comment 20: Growing Season for Cutrale

For the preliminary determination, the Department instructed the respondents in this investigation to report the costs for self-produced oranges incurred for a single Brazilian growing season (*i.e.*, February 2003 to January 2004), rather than those incurred during the POI (which covered portions of two growing seasons). Although Cutrale reported costs for the growing season as requested, for reporting purposes, Cutrale allocated these costs over the quantity of orange juice produced during the POI. At verification, we found that Cutrale’s methodology ignores the quantity of self-produced oranges that entered the production process during the POI. In other words, the value that Cutrale added to its reported costs is related to the boxes of oranges harvested during the growing season, rather than the boxes of oranges that were input into the production process during the POI. Thus, we determined that it would be more appropriate for the final determination to value Cutrale’s self-produced orange costs by calculating the per-unit cost of growing oranges for the full growing season and then multiplying the resulting per-unit amount by the quantity of self-produced oranges used in production during the POI. See the Cutrale Cost Verification Report at page 2.

In its case brief, Cutrale disagrees with the Department’s methodology of using the costs incurred during the 2003-2004 growing season, given that much of the period is outside the POI and the costs incurred during this harvest season do not accurately reflect Cutrale’s actual POI costs for self-produced orange juice inputs. According to Cutrale, section 773(f)(1)(A) of the Act states that costs shall normally be calculated based on the records of the exporter or producer of merchandise, if such records are kept in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the subject merchandise. Cutrale maintains that it is the Department’s practice to use a company’s books and records to calculate its costs, citing Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 70 FR 12648 (Mar. 15, 2005) (Wire Rod from Trinidad and Tobago) and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil, 70 FR 60282 (Oct. 17, 2005), and accompanying Issues and Decision Memorandum at Comment 4 (Pipe from Brazil). Cutrale asserts that the cost of its own fruit, as recorded in its accounting system in accordance with Brazilian GAAP, accurately reflects the monthly costs of growing, picking, harvesting and transporting fruit from its farms.

Cutrale argues that using the 2003-2004 growing season distorts its cost of production because it does not reflect the actual POI costs associated with the production of the merchandise under investigation. According to Cutrale, because oranges have to be crushed and processed into juice within 48 hours of being picked from the tree, the actual cost of the fruit produced in a given month is recorded by Cutrale as raw material cost in that same month. Cutrale contends that the Department has recognized this fact for fruit purchased from unrelated suppliers, as it used the actual POI cost of such purchases. In contrast, Cutrale argues that the growing season chosen by the Department does not reflect the actual costs incurred during the POI because it includes the costs associated with oranges harvested prior to the POI. Thus, during the period May through September 2004, Cutrale claims that the Department is calculating costs for oranges unrelated to those actually used by it in juice production. Consequently, according to Cutrale, the Department's methodology does not reflect its actual cost of production for self-produced oranges.

Cutrale contends that the Department has not provided a rationale for its use of the 2003-2004 growing season to calculate POI growing season costs. According to Cutrale, the only justification for applying this methodology is to capture all the growing costs related to an entire harvest. Cutrale argues that its reported POI costs already cover a twelve-month period, including pre-harvest as well as harvesting costs, thus comprising an entire crop period. According to Cutrale, there is nothing in the statute or the regulations that requires the use of a single harvest in calculating costs. Moreover, Cutrale argues that even if the Department were to adopt a policy of calculating costs for a single crop year, that policy should be subordinate to the requirement of the statute that the cost of production reasonably reflect the company's actual cost of production during the POI. Cutrale contends that by using the cost from the 2003 growing season to value self-produced oranges, the Department is not only using costs incurred for fruit processed before the POI, but also using pre-harvest costs incurred one year before the POI pre-harvest costs were incurred. Cutrale asserts that the information needed to calculate its actual cost of production during the POI is on the record and the Department should use this information to calculate the POI cost of self-produced oranges for the final determination.

However, Cutrale argues that, should the Department continue to use costs from the 2003 growing season in the final determination, it should not multiply the average per-unit fruit cost from the 2003 growing season by the POI consumption quantity of self-produced oranges. According to Cutrale, such a methodology would arbitrarily exaggerate Cutrale's cost of production. Cutrale contends that the amount of juice produced by the oranges in a particular harvest varies from year to year, and this variance can have a large impact on the average costs incurred for fruit production. Cutrale argues that the Department's methodology of calculating the cost of self-produced oranges using the 2003 growing season ignores this variation in the juice yield between crop years and overstates Cutrale's POI cost of production. Cutrale notes that it produced fewer oranges in the 2003 crop year than it did during the POI, so its fixed costs of operating its farms in 2003 are spread over a smaller production quantity. In addition, Cutrale contends that the Department's methodology incorrectly assumes that it would use the same quantity of oranges to produce the amount of juice it produced using oranges harvested during the POI (i.e., mostly 2004 crop-year oranges). Cutrale proposes that the Department employ a

less “distortive” methodology if it continues to use the 2003 crop-year costs by deducting the total cost of Cutrale’s self-produced oranges during the POI and adding back the cost of self-produced oranges incurred for the 2003 crop year. According to Cutrale, this is the methodology it followed in its section D supplemental questionnaire response.

Finally, Cutrale argues that the Department’s suggested methodology would violate GAAP because it does not match revenue with expenses. Cutrale notes that, in its normal books and records, it ties its expenses and income by taking all its costs of growing, harvesting, and transporting its own fruit in the month that the fruit is actually crushed. However, according to Cutrale, the Department’s methodology would require it to take the costs incurred during a growing period which began months before POI oranges are actually processed and then apply those costs to the cost of manufacture during the POI, creating a credit balance in Cutrale’s current assets account which would have to be applied to its cost of production. Cutrale claims that this would not be permissible under GAAP, and thus it demonstrates that the Department’s proposed methodology is nonsensical.

The petitioners maintain that the Department acted properly in using the 2003-2004 growing season as the basis for its calculation of the cost of self-produced oranges in the preliminary determination. According to the petitioners, the Department noted at verification that Cutrale’s methodology for calculating the cost of self-produced oranges was inadequate because it failed to account for the quantity of self-produced oranges which entered the production process during the POI, resulting in an understated total cost of manufacturing. Thus, the petitioners assert that the Department should make an adjustment to Cutrale’s self-produced orange costs using the methodology proposed in Cutrale’s cost verification report. See the Cutrale Cost Verification Report at pages 2 and 18.

The petitioners note that the Department correctly determined that the crop year for self-produced oranges is February 2003 through January 2004 based on information provided by Cutrale in its questionnaire responses. The petitioners argue that, contrary to Cutrale’s assertion, the 2003 crop year accurately reflects the costs of its self-produced oranges during the POI because it is the Department’s longstanding practice in cases involving agricultural products to consider the cost of the raw material input for the complete growing and harvesting season which most closely corresponds to the POI. See Honey From Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 3 (Honey from Argentina); and Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico, 61 FR 56608, 56610 (Nov. 1, 1996) (Tomatoes from Mexico). Thus, the petitioners argue that the Department should reject Cutrale’s arguments and continue to calculate Cutrale’s costs for self-produced oranges based on the 2003 crop year.

Department's Position:

We disagree with Cutrale that the cost of its self-produced oranges should be determined based on the production quantity and cost incurred during the POI, rather than for one complete growing season. Section 773(f)(1)(A) of the Act states, in part:

Costs shall normally be calculated based on the records of the exporter or producer of merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

Hence, contrary to Cutrale's assertions, in those instances where the Department determines that a company's normal accounting practices result in a misallocation of product costs, section 773(f)(1)(A) of the Act permits the Department to deviate from the respondent's normal books and records and use an alternative calculation methodology that more accurately captures the actual cost incurred to produce the merchandise. We note that, in the instant case, Cutrale itself deviated from its normal books and records because it normally only assigns harvesting costs to the cost of growing oranges; however, for reporting purposes, Cutrale adjusted its normal books and records to include the growing costs it incurred related to the POI pre-harvest period.

Cutralé's submitted methodology to determine the cost of self-produced oranges, however, assumes that it is appropriate to simply piece together the costs and production during four harvesting months from one growing season and the costs and production during eight months from another growing season (five pre-harvest growing months and three harvest months), and end up with a whole growing season. While we agree that this methodology does yield 12 months of costs and production quantities, we disagree that the result is meaningful in determining an accurate per-unit cost of growing oranges. Under this approach, the per-unit cost calculation includes pre-harvest growing costs from one growing season, and harvest costs and quantities from a portion of two different growing seasons, one of which has nothing to do with the pre-harvest growing costs included in the calculation. Due to differing weather conditions from one growing season to the next, it is reasonable to expect varying pre-harvest growing costs and related yields from one growing season to the next. In addition, again due to varying weather conditions, it is reasonable to expect peak yields to vary from month to month within a growing season. For example, in one growing season, the peak harvest may occur during October and November. In another growing season, peak harvest may occur earlier, in August and September. Thus, simply piecing together the October and November harvest from one growing season with the August and September harvest from another may result in an unreasonably low or high yield, depending on the facts surrounding each growing season. In addition, because the number of productive trees in place changes from season to season, using parts of two different growing seasons may cause a mismatch between the pre-harvest growing costs associated with the trees in production during one year and the harvest quantity associated with the trees in production during another year.

We have faced similar difficulties in our attempt to determine the cost of other agricultural products having a defined growing season and have established the practice of using the costs and harvest quantity for one entire growing season. In doing so, we normally use the growing season that most closely corresponds to the POI or period of review in order to calculate accurate average per-unit costs. See, e.g., Honey from Argentina at Comment 3.

Many agricultural products, including oranges, have a defined growing season which culminates in the harvest. In this instance, the POI covers a 12-month period (*i.e.*, October 2003 to September 2004), which straddles two growing seasons. In an effort to determine the appropriate growing season associated with the POI, the Department sent the respondents supplemental questionnaires requesting each to identify the growing and harvesting period for its self-produced oranges. In its response, Cutrale stated that “the overall crop period is July through January” and “the growing season is the period between crop harvests.” See Cutrale’s June 9, 2005, supplemental questionnaire response at page 2. Thus, we determined that the crop growing period lasts from February through June, while the harvesting period is July through January. Consequently, we reasoned that the majority of the POI orange juice sales were produced using orange inputs harvested from the 2003 crop growing season (*i.e.*, the growing and harvesting season for the period February 2003 through January 2004). In other words, harvesting for the 2004 growing season did not commence until July 2004; therefore, orange inputs from the 2004 growing season could only have been used in the production of orange juice during the last three months of the POI. As a result, we determined that the 2003 growing season most closely corresponds to the inputs used to produce sales made during the POI, and accordingly we requested that both respondents provide self-produced orange costs based on this period.

As noted above, there are three months of the POI where the self-produced orange inputs could have been sourced from oranges produced during the 2004 growing season. Nonetheless, we used the average per-unit cost from the 2003 growing season to value those inputs, consistent with our practice of using the costs and harvest quantity for one entire growing season. We note that we had no record evidence showing the crop costs or yields for the respondents for either period at the time this decision was made. While we agree with Cutrale that crop yields and pre-harvesting growing costs differ from one crop year to another, we based our decision to request and use data only for the 2003 growing season on the desire to alleviate any undo burden on the respondents. As an alternative, the respondents could have provided reasons for using both crop years’ costs and production quantity, and then submitted cost and production data for both growing seasons. However, Cutrale chose instead to simply insist on using portions of the two different growing and harvesting seasons, resulting in a meaningless per-unit cost. Because cost and production information for the two entire growing seasons is not available on the record of the instant case, we have continued to rely on the self-produced orange costs incurred by Cutrale during the 2003 growing season to value the orange inputs used to produce orange juice during the POI.

Further, we find that Cutrale’s reliance on Wire Rod from Trinidad and Tobago and Pipe from Brazil is misplaced. In both cases, the Department continued to rely on the respondents’ costs as recorded in their books and records because it found that these records reasonably reflected the

costs associated with the production and sale of subject merchandise. See Wire Rod from Trinidad and Tobago at Comment 1; and Pipe from Brazil at Comment 5. Both of these cases differ from the instant case, where we find that Cutrale's reported costs for self-produced oranges are distorted, as demonstrated above.

Finally, we reject Cutrale's argument that if the Department persists in using the costs of the 2003 growing season to calculate Cutrale's cost of self-produced oranges, it should simply accept Cutrale's cost as reported in the supplemental section D response without further adjustment, which simply substitutes its POI fruit growing and harvesting costs with its 2003 growing season costs. Cutrale's suggested methodology ignores the quantity of self-produced oranges that actually entered the production process during the POI. Consequently, we determined the cost of Cutrale's self-produced oranges consumed in the production of orange juice by multiplying the average per-unit cost of growing and harvesting oranges from the 2003 season by the quantity of self-produced oranges consumed during the POI.

Comment 21: Data Changes Arising from the Cutrale Cost Verification

The petitioners state that Cutrale presented certain minor corrections to its reported cost of production database at the cost verification. In addition, the petitioners contend that the Department noted that Cutrale improperly excluded costs related to research and development (R&D) for insecticides from its reported production costs. For a detailed description of all the changes described by the petitioners, see the petitioners' November 1, 2005, case brief at pages 33 through 35. The petitioners contend that the Department should increase Cutrale's reported COM to correct these minor errors for the final determination.

Cutrale did not comment on these issues.

Department's Position:

Based on our findings at verification, we have adjusted Cutrale's COM to make each of the corrections noted by the petitioners, except for the insecticide R&D costs noted above. For a detailed description of all adjustments made to Cutrale's reported production costs for the final determination, see the January 6, 2006, memorandum from Ji Young Oh to Neal Halper entitled, "Cost of Production and Constructed Value Adjustments for the Final Determination - Sucocitrico Cutrale Ltda (Cutrale Final COP/CV Calculation Memo).

Regarding the R&D costs described by the petitioners, we note that these R&D costs (which largely related to research on insecticides for orange production) were not excluded from the reported costs, but rather were included as part of the COM. See the Cutrale Cost Verification Report at pages 41 and 42. Consequently, for the final determination any further adjustment to Cutrale's reported costs for R&D costs is unwarranted.

Comment 22: By-Product Adjustment Associated with Cutrale's Non-Orange Fruit Inputs

Cutrale argues that the Department should continue to reduce its reported costs by the sales revenue received for by-products produced from non-orange fruit inputs (e.g., oil and essence from producing lemon juice, etc). According to Cutrale, it would only be appropriate to disallow the by-product revenue offset to the reported costs for the non-orange crops if the by-product costs related to the production of these items were also excluded from the reported costs. However, Cutrale contends that because it calculates the by-product costs for its entire group of by-products, including those by-products resulting from the processing of non-orange crops, its non-orange crop by-product costs are also included in its orange juice production costs. Cutrale claims that its records do not permit it to segregate the by-product costs by each type of fruit crop (e.g., lemon, orange, grapefruit, etc.). Thus, Cutrale maintains that disallowing the offset to its reported costs for non-orange crop by-product sales revenue would overstate its reported costs.

The petitioners argue that both the by-product costs and revenues related to non-orange crops should be excluded from Cutrale's reported costs. The petitioners note that the Department verified that such costs and revenues were: 1) identifiable; and 2) not related to the orange juice joint production process. See the Cutrale Cost Verification Report at page 2. Consequently, the petitioners maintain that the Department should not offset Cutrale's reported costs by the net revenue attributable to the sales of non-orange crop by-products.

Department's Position:

We find that it would be inappropriate to include either the by-product costs or revenues attributable to non-orange crops in Cutrale's costs. In the ordinary course of business, Cutrale tracks only the further processing costs of by-products and, consequently, its by-product costs do not include raw material costs. Thus, for reporting purposes, Cutrale added the further processing costs of by-products to its reported costs and then reduced the result by the sales revenues of these by-products. See Comment 7, above. At verification, the Department found that a portion of the reported by-product revenue offset was related to the production of non-orange crops. While we agree with Cutrale that the non-orange crop by-product costs were commingled with the orange-crop by-product costs, we were able to estimate the by-product cost for these non-orange crops based on record evidence. See Cutrale's August 26, 2005, section D response at exhibits 8 and 14 and the Cutrale Cost Verification Report at pages 2 and 3. Since the Department is able to segregate and calculate Cutrale's non-orange crop by-product costs and revenues from its orange crop by-product costs and revenues, we deem it inappropriate to include the non-orange crop by-product costs and revenues in the reported costs. Thus, for the final determination, we have excluded these amounts from Cutrale's reported costs.

Comment 23: Non-Product Specific Costs for Fischer

Fischer argues that the Department erred in its preliminary determination by calculating unique COPs for FCOJM and NFC. Fischer contends that using separate COPs for FCOJM and NFC is improper because the petitioners initiated this investigation based on a single class or kind of

merchandise, certain orange juice, rather than the two separate products of FCOJM and NFC. According to Fischer, the Department created two separate products in the preliminary determination by inappropriately calculating separate COPs for FCOJM and NFC, thereby penalizing Fischer with a higher COP. Fischer alleges that the Department must calculate its COP consistent with the scope of this investigation and thus determine a single COP for certain orange juice.

The petitioners contend that Fischer has misinterpreted the meaning the term “single class or kind of merchandise.” The petitioners assert that it is the Department’s practice to require respondents to report costs on a control number (or “CONNUM”)-specific basis, rather than to report a single cost for each class or kind of merchandise. The petitioners argue that performing the sales-below-cost test using a single COP for the class or kind of merchandise under investigation would be without basis or merit. The petitioners point out that Fischer has reported costs for three separate CONNUMs (i.e., FCOJM, NFC, and Dairy Pak) which are distinguished by their different brix levels. Further, the petitioners note that Fischer maintains separate accounts in its books and records for FCOJM and NFC, as verified by the Department. Accordingly, the petitioners maintain that the Department should continue to use separate CONNUM-specific COPs for Fischer in its calculations for the final determination.

Department’s Position:

It is the Department’s practice to make product comparisons (and to determine product costs) based on the physical characteristics of the merchandise, regardless of whether an investigation is initiated on a single class or kind of merchandise. For example, in the investigation of certain frozen and canned warmwater shrimp from India, the Department initiated this case on a single class or kind of merchandise. See Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, 69 FR 3876, 3878 (Jan. 27, 2004). Nonetheless, we made product comparisons based on the physical characteristics of the merchandise specified in the Department’s questionnaire. Specifically, we stated:

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an “as sold” basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India, 69 FR 47111, 47114 (Aug. 4, 2004) (unchanged by the final determination). In effect, Fischer takes issue with the Department’s model matching hierarchy as established for this investigation.

While FCOJM and NFC are the same class or kind of merchandise in this investigation, the products have different physical characteristics. Specifically, FCOJM and NFC have different concentration levels, as measured by their reported brix levels. Consequently, in our sales and cost questionnaires, we required the respondents to report the physical characteristics of each product and to assign each a unique control number. Furthermore, consistent with our normal practice, we required that respondents provide separate sales and cost data for each CONNUM – accounting for each physical characteristic – so that proper comparisons could be made. See the standard sections B, C, and D questionnaires at Questions B.IV.2.0, C.IV.2.0, and D.III.A.3.

Further, while we note that we did initiate this investigation on a single class or kind of merchandise, the notice of initiation clearly states that scope of this investigation includes “certain orange juice for transport and/or further manufacturing, produced in two different forms: (1) Frozen orange juice in a highly concentrated form, sometimes referred to as frozen concentrated orange juice for further manufacturing (FCOJM); and (2) pasteurized single-strength orange juice which has not been concentrated, referred to as Not-From Concentrate (NFC).” See Certain Orange Juice from Brazil: Initiation of Antidumping Duty Investigation, 70 FR 7233, 7233-7234 (Feb. 11, 2005). In that notice, we set aside a period for parties to comment on scope issues and the definition of the class or kind of merchandise under consideration. At that time, no party commented that FCOJM and NFC should be treated as a single product for the purposes of the Department’s calculations. Therefore, for the final determination, we are continuing to use Fischer’s CONNUM-specific COPs in our margin calculations.

Comment 24: G&A Expenses for Fischer

The petitioners argue that Fischer understated the G&A expense ratios for both Fischer and its collapsed affiliated juice producer. First, the petitioners maintain that Fischer’s G&A expense ratio excludes contingency losses related to labor and civil actions. Second, the petitioners state that the denominator used to calculate the collapsed affiliated juice producer’s G&A rate improperly includes packaging and storage expenses.

Fischer argues that the exclusion of contingency losses in the calculation of its reported G&A expense ratio is correct. Fischer explains that in calculating its G&A expense ratio, it relied upon its cash-basis, rather than its accrual-basis, G&A expenses. Fischer contends that the reported G&A expenses should be on a cash basis because its books and records are maintained on a cash basis and it is the Department’s policy to rely on the company’s normal books and records.

In addition, Fischer argues that it may have double-counted G&A expenses due to the merger of Citrusuco Paulista S.A. (Citrusuco)<sup>25</sup> and Fischer S.A. Agropecuaria (Agropecuaria) prior to the POI during the 2004 fiscal year. Fischer cites the Fischer Cost Verification Report at pages 3, 26, and 27, where the Department noted that G&A expenses related to the orange groves were

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<sup>25</sup> We note that we determined in the preliminary determination that Fischer is the successor-in-interest to Citrusuco. See Preliminary Determination, 70 FR at 49559.

included in both Fischer's reported self-produced fresh fruit COP and the reported G&A expense ratio. Thus, Fischer requests that the Department collapse all G&A expenses for the final determination to eliminate the possible double-counting.

Department's Position:

We agree with the petitioners with regard to the treatment of Fischer's contingency losses. While Fischer claims that it does not keep its records on an accrual basis, we note that its 2004 financial statements, upon which the G&A expense rates are based, are reported in accordance with Brazilian GAAP, which requires the use of an accrual-based system. Furthermore, Note 2 of Fischer's 2004 financial statements explicitly states that preparation of financial statements requires the use of estimates and, accordingly, management provides estimates of the provisions for contingent liabilities. See the August 4, 2005, Supplemental Section D Response at Exhibit 10. Therefore, for the final determination, we used Fischer's 2004 financial statements to calculate its G&A expense ratio, including the contingency losses in the G&A expenses. Additionally, it is the Department's practice to calculate the G&A expense ratio using a denominator that is on the same basis as the per-unit manufacturing costs to which the rate is applied. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 29. Therefore, because packaging and storage expenses were reported as sales expenses (*i.e.*, they were not included in the per-unit manufacturing costs), we adjusted the collapsed affiliated juice producer's G&A expense ratio to exclude these items from the denominator of the calculation.

In addition, we agree that certain of Fischer's G&A expenses were double counted. Fischer calculated its G&A expense ratio based on its fiscal year 2004 financial statements. Because Citrosuco and Agropecuaria merged during the fiscal year, the 2004 financial statements capture the G&A expenses incurred by Agropecuaria from the point of the merger until the end of the fiscal year (Fischer's fiscal year is the calendar year). However, the fresh fruit COP reported by Agropecuaria for the growing period also includes its G&A expenses. As a result, a portion of the G&A expenses of Agropecuaria were double counted. Therefore, we have adjusted Fischer's reported costs to eliminate any duplication of Agropecuaria's G&A expenses for the final determination.

Comment 25: Brix Level for Fischer's Dairy Pak Orange Juice

Fischer argues that the Department should calculate a COP for Dairy Pak which reflects the products unique concentration level. Fischer points out that, as stated in the Department's cost verification report, Dairy Pak is produced by adding pulp cells and essential oils to processed FCOJM. According to Fischer, this results in Dairy Pak having a lower concentration level (*i.e.*, lower brix level) than FCOJM. Fischer asserts that the Department failed to adjust the COP of Dairy Pak to account for this difference in brix level in the preliminary determination, and it requests that the Department do so for the final determination.

The petitioners did not comment on this issue.

Department's Position:

While we agree with Fischer that the cost differences resulting from Dairy Pak's lower concentration level should be accounted for in the calculation of its COP, we disagree that such an adjustment is needed for the final determination. At the time of the preliminary determination, the respondent had submitted COPs for FCOJM and NFC only. See the June 28, 2005, Section D response at Exhibit D-1 and the August 4, 2005, Supplemental Section D response at Exhibit D-1. However, the Department found that these reported COPs were constructed using finished production as the basis for allocating total costs to products. Thus, the submitted COPs failed to reflect the differences in cost caused by the varying concentration levels of products (e.g., because of the difference in concentration levels, the production of one kilogram of FCOJM would require greater quantities of raw materials than the production of one kilogram of NFC). See the August 16, 2005, memorandum to Neal M. Halper, Director Office of Accounting, through Taija A. Slaughter, Program Manager, from Heidi K. Schriefer, Senior Accountant, and Frederick Mines, Accountant, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination - Fischer S/A - Agroindustria" (Fischer Preliminary Cost Calculation Memo) at page 1. Therefore, for the preliminary determination, the Department adjusted Fischer's reported COPs to account for the difference in concentration levels using facts available – the reported brix levels of the products. However, after the preliminary determination, Fischer submitted COPs for all three of its products (i.e., FCOJM, NFC, and Dairy Pak) which accounted for the cost differences resulting from the variation in product concentration levels. In the revised cost files, Fischer used raw material input quantities to allocate total costs to individual products, thereby accounting for the cost impact of the varying concentration levels among products.

Dairy Pak, as Fischer explained in its submission, is "...produced by taking FCOJM and blending back pulp cells and essential oils and/or essences that were removed as by-products during the FCOJM production process." See Fischer's August 29, 2005, Second Section D Supplemental response at page D-5. The difference in brix levels between Dairy Pak and FCOJM has now been accounted for through Fischer's cost calculation methodology. Specifically, Fischer used raw material inputs to allocate its total costs between FCOJM and NFC. See the Fischer Cost Verification Report at page 9. Then, to calculate the per-unit COP for Dairy Pak, Fischer totaled the quantity and value of the pulp cells, oils, and essences and the quantity and value of FCOJM used in the production of Dairy Pak to calculate total Dairy Pak costs and divided by the finished production quantity of Dairy Pak. Because Fischer used the quantities of raw material inputs consumed in the production of each product as the basis of its cost allocation, Fischer's cost methodology effectively accounts for the cost differences created by the varying product concentration levels (e.g., the greater the concentration level of the product, the greater the quantity of fresh fruit consumed to produce one kilogram of the desired product).

Thus, because the Fischer COP database used in our calculations for the final determination already accounts for the cost impact of the differing concentration levels of its reported products,

an adjustment to Fischer's reported COP for Dairy Pak based on its concentration level is unnecessary.

Comment 26: Harvesting Cost for Fischer

The petitioners claim that Fischer incorrectly attributed a portion of its fresh orange harvesting costs to the packing house (*i.e.*, to oranges destined for the fresh market rather than the juice factories) and, as a result, understated material costs for certain orange juice when reporting the COP to the Department. In support of their assertion, the petitioners refer to the Department's cost verification report which notes that a portion of the oranges originally sent to the packing house were rerouted to Fischer's juice factories. See the Fischer Cost Verification Report at pages 1, 14, and 26-27. The petitioners note that the harvest costs related to fresh oranges rerouted to the juice factories were omitted from the reported COP for juice. Therefore, the petitioners urge the Department to revise the reported costs to include the harvesting expenses related to rerouted oranges in the final determination.

Fischer acknowledges that it understated the reported material costs for juice by failing to adjust its harvesting costs for the oranges rerouted from the packing house to the juice production facilities. According to Fischer, the error was appropriately identified in the Fischer cost verification report.

Department's Position:

As noted in the Fischer cost verification report, a portion of the oranges sent to the packing house were rerouted to Fischer's juice production facilities; however, the related harvesting costs were not included in the costs reported to the Department. See the Fischer Cost Verification Report at page 2. Therefore, for the final determination, we revised Fischer's reported COP to include the omitted harvesting costs of self-produced oranges.

Comment 27: Undervalued Orange Cost for Fischer

The petitioners claim that Fischer undervalued its direct material costs by reporting certain oranges purchased from unaffiliated parties at Fischer's per-unit cost of self-produced oranges rather than at the unaffiliated purchase price. The petitioners refer to the cost verification report which notes that oranges transferred from Fischer to its collapsed affiliated juice producer were valued for reporting purposes at the average growing season per-unit COP for self-produced oranges (*i.e.*, from Agropecuaria). However, the petitioners point out that, according to the cost verification report, Fischer had actually obtained the oranges in question from unaffiliated suppliers, rather than from Agropecuaria's groves. Similarly, the petitioners state that the Department determined at verification that Fischer reported transfers from its collapsed affiliated juice producer at the transfer price between itself and its affiliate rather than at the actual unaffiliated purchase price of the oranges. Consequently, the petitioners request that the Department adjust Fischer's reported costs to reflect the actual unaffiliated purchase prices of the oranges transferred between Fischer and its collapsed affiliated juice producer.

Fischer agrees that it undervalued orange costs transferred to its collapsed affiliated juice producer by reporting all the oranges this entity purchased from Fischer at Agropecuaria's average growing season per-unit COP. Fischer acknowledges that it incorrectly considered that all oranges transferred to its collapsed affiliated juice producer were from Agropecuaria's groves when in fact a portion of those oranges were obtained from unaffiliated suppliers. However, Fischer claims that the orange cost used by the Department should reflect the transfer price between Fischer and its collapsed affiliated juice producer rather than the average growing season cost.

Department's Position:

Based on the tests performed at verification, we determined that the respondent undervalued its direct material costs by reporting oranges purchased from unaffiliated suppliers and transferred to Fischer's collapsed affiliated juice producer at the COP for self-produced oranges. Likewise, we noted that the oranges transferred to Fischer from its collapsed affiliated juice producer were also undervalued because they were reported at the transfer price between the two parties rather than at the unaffiliated purchase price. See the Fischer Cost Verification Report at page 3.

First, to clarify, we note that Fischer merged its orange grove and juice operations during the POI (i.e., in May 2004). Therefore, for reporting purposes, we requested that Fischer value its self-produced oranges consumed in juice production after the merger at the average growing season per-unit cost of self-produced oranges. During the POI, Fischer's collapsed affiliated producer obtained oranges from Fischer. Accordingly, Fischer reported the collapsed affiliated producer's orange cost at the average growing season per-unit cost of self-produced oranges. However, during verification, we discovered that a portion of the transferred oranges had actually been purchased from unaffiliated suppliers. Similarly, the oranges transferred to Fischer from its collapsed affiliated producer were erroneously reported at the parties' transfer price rather than at the purchase price paid to the unaffiliated suppliers. See the Fischer Cost Verification Report at pages 5, 17-18, and 28.

The value of the oranges in question should reflect the actual purchase price paid to the unaffiliated suppliers. As both parties acknowledge, the per-unit grove COP is an inappropriate valuation of the oranges because the fruit was not self-produced. We disagree with Fischer that the value of the oranges in question should reflect the average transfer price between Fischer and its collapsed affiliated producer because, as stated in the preliminary determination, we are treating Fischer and its affiliate as one entity. See Preliminary Determination, 70 FR at 49563. As such, it is inappropriate to value these transactions at their transfer price because the Department's practice is to value transactions between collapsed affiliates at cost. See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18429 (Apr. 15, 1997). Accordingly, for the final determination, we adjusted Fischer's reported costs to reflect the unaffiliated purchase prices (i.e., the cost of the orange input) of the oranges in question.

Comment 28: Finished Goods “Purchased” from One of Fischer’s Affiliates

At verification, Fischer provided a worksheet to reconcile its reported costs with the amounts recorded in its accounting system. One of the reconciling items on this worksheet related to the cost of finished goods purchased from Fischer’s affiliated orange juice producer. The petitioners claim that neither Fischer nor its affiliate included these costs in their reported cost databases. The petitioners contend that not only were these costs significant, but Fischer did not provide a sufficient, reasonable or justifiable reason for excluding them. Therefore, the petitioners urge the Department to revise Fischer’s reported costs to capture the affiliated purchases of finished goods.

Fischer notes that it did not produce the purchased finished goods in question. Fischer maintains that, as a result, it appropriately excluded these purchases from its reported COP.

Department’s Position:

We disagree with the petitioners that Fischer failed to report the costs in question. Contrary to the petitioners’ supposition that the finished goods in question were not included in the collapsed affiliated juice producer’s cost file, we note that our overall cost reconciliation at verification of the total costs from the financial statements to the total reported costs shows no reduction in the affiliate’s total costs for the finished goods that were transferred to Fischer.

During the POI, Fischer’s collapsed affiliated juice producer did not possess an export license; therefore, after this affiliate produced the merchandise in question, it then transferred the finished goods to Fischer. See the Fischer Cost Verification Report at page 16. Because in the preliminary determination the Department determined that it is appropriate to treat Fischer and its affiliated juice producer as collapsed entities, Fischer submitted separate cost files for both companies. Thus, for purposes of the final determination, the Department weight-averaged the costs (as adjusted based on our findings at verification) from the two cost files. Consequently, the finished goods produced during the POI by Fischer’s affiliate were reported in the collapsed affiliated juice producer’s cost file at their actual cost of production. See the Fischer Cost Verification Report at pages 12-17. Therefore, because the cost of producing the finished goods in question were captured in Fischer’s collapsed affiliated juice producer’s reported cost file, we find that no further adjustment is necessary for the final determination.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

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Stephen J. Claeys  
Acting Assistant Secretary  
for Import Administration

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(Date)